
JUDICIAL RECONSTRUCTION AND THE RULE OF LAW

REASSESSING FOREIGN MILITARY INTERVENTION

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DECLARATION

This thesis is the product of my own work. Where data from other authors has been used, in paraphrase or *verbatim*, it is acknowledged within the text and in the references. Except acknowledged documentary and other sources, the content is my original product.



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ABSTRACT

The 'rule of law' is increasingly held out as a panacea to domestic and international ills, but it is a concept which is severely tested when foreign military intervention attempts to create or reconstruct it in national communities.

At a theoretical level, the rule of law has emerged from the traditional division between substantive and formal views, which debate the necessary involvement of values, into a practitioner-centric 'blue-print analysis,' in which a universal concept of the rule of law is said to encompass a checklist of human rights-based, recognisable court and democratic legislative institutions. This blueprint seeks the ideal of the 'fair trial' as the mission of interveners, disregarding the extant recognition in international law that this human right is necessarily derogable in states of national emergency.

When rule of law theories are deconstructed, no universal agreement between cultures can be detected at a conceptual level. However, the adoption of the rights-based institutionalist model for the international rule of law results in international pressure on its constituent states to develop consistent rule of law practice, in order to maintain coherence at the higher level. This, however, precludes the formation of domestic rules of law, when the rule of law is properly understood as a relationship in which the community chooses law as its means of self-ordering. This fundamental tension is behind the underlying push for military intervention to restore or create the rule of law, and the failure of legitimacy which results.

The content of the laws of intervention, applying particularly to occupation under international humanitarian law, are based on an altogether different approach. Both occupation law and intervention authorised under the United Nations Security Council's coercive power to restore international peace and security essentially confer powers relating to order and security. Occupation law specifically precludes intervention in the domestic judicial system which would have a permanent effect or cause essential change in the indigenous structure. It is to be compared with recent

moves, including in Kosovo and East Timor, for UN Security Council authorised interveners to attempt permanent judicial restructuring in the pursuit of rule of law, as part of their “all necessary means” to restore order and security, but the result mirrors results under occupation: efforts tend overwhelmingly to fail without an existing basic level of security in society. Further, measures emanating from interveners, who are not part of the domestic rule of law relationship because they are not subject to domestic law, tend to lack legitimacy, in the sense of social acceptability, for the domestic population. Much more than local ‘buy-in’ is required; successful rule of law measures must originate within the community.

What the law of interventions in both cases does allow is measures contrary to the blueprint analysis of the rule of law, including establishing special military courts and administrative detention for security purposes, so that order and security may be restored. It is here where the proper focus of military intervention must lie, so that the conditions for the formation of a domestic rule of law may be laid. There is no limit on the advice or assistance the intervener may offer to the subject community, but overt and potentially coercive ‘rule of law’ measures cannot succeed until the primary mission of public order is achieved, at which point the extant authority of the intervener to engage in coercive measures expires. The future of rule of law operations must be a refocusing on public order, rather than judicial reconstruction, if indeed it is the rule of law which is at stake.

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TABLE OF ABBREVIATIONS

<i>AJIL</i>	<i>American Journal of International Law</i>
<i>Am J Comp Law</i>	<i>American Journal of Comparative Law</i>
<i>Ann Dig</i>	<i>Annual Digest</i>
ASIL	American Society of International Law
<i>Boston Uni LR</i>	<i>Boston University Law Review</i>
<i>BYBIL</i>	<i>British Yearbook of International Law</i>
<i>Can YBIL</i>	<i>Canadian Yearbook of International Law</i>
CCCI	Central Criminal Court of Iraq
CCCI-K	Central Criminal Court of Iraq—Karkh
CCCI-R	Central Criminal Court of Iraq—Rusafa
CLAMO	Center for Law and Military Operations
<i>Columbia LR</i>	<i>Columbia Law Review</i>
<i>Conn J Intl Law</i>	<i>Connecticut Journal of International Law</i>
CPA	Coalition Provisional Authority
CRRB	Combined Review and Release Board
<i>Dick J Intl Law</i>	<i>Dickinson Journal of International Law</i>
ECtHR	European Court of Human Rights
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>Ga J Intl & Comp Law</i>	<i>Georgia Journal of International and Comparative Law</i>
<i>Fordham LR</i>	<i>Fordham Law Review</i>
<i>Florida J of Intl Law</i>	<i>Florida Journal of International Law</i>
<i>Harv Intl LJ</i>	<i>Harvard International Law Journal</i>
<i>Harv Hum Rts J</i>	<i>Harvard Human Rights Journal</i>
<i>Hastings Int'l & Comp L Rev</i>	<i>Hastings International and Comparative Law Review</i>
<i>Hofstra LR</i>	<i>Hofstra Law Review</i>
<i>Hous J Intl Law</i>	<i>Houston Journal of International Law</i>
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHT	Iraqi High Tribunal
ILA	International Law Association
<i>Isr YBHR</i>	<i>Israeli Yearbook of Human Rights</i>
IMT	International Military Tribunal
INTERFET	International Force East Timor
<i>J Refugee Stud</i>	<i>Journal of Refugee Studies</i>
LAOTF	Law and Order Task Force
<i>LQR</i>	<i>Law Quarterly Review</i>
<i>MJIL</i>	<i>Melbourne Journal of International Law</i>
MNF-I	Multi-National Force — Iraq
<i>Rev of Intl Studies</i>	<i>Review of International Studies</i>
<i>RJT</i>	<i>Revue Juridique Thémis</i>
<i>Stan LR</i>	<i>Stanford Law Review</i>

UN	United Nations
UNAMI	United Nations Assistance Mission in Iraq
UNAMIR	United Nations Assistance Mission in Rwanda
<i>Uni Chicago LR</i>	<i>University of Chicago Law Review</i>
UNITAF	Unified Task Force
UNMIK	United Nations Mission in Kosovo
UNMISSET	United Nations Mission of Support in East Timor
UNOC	United Nations Operation in the Congo
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Authority in East Timor
UNTS	United Nations Treaty Series
<i>Virg J Int'l L</i>	<i>Virginia Journal of International Law</i>
<i>Yale LJ</i>	<i>Yale Law Journal</i>
<i>Yale J L & Feminism</i>	<i>Yale Journal of Law and Feminism</i>
<i>YB of IHL</i>	<i>Yearbook of International Humanitarian Law</i>

INTRODUCTION

“One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles,” declares Carothers.¹ The United Nations in particular considers it a “critical civilizing influence in every free society,” characterised by democracy, liberty, equality and justice.²

However, the rule of law, as a catchcry in support of or even as justification for military intervention into independent states,³ is a cry fraught with logical inconsistencies. Essential misunderstandings about the rule of law by both theorists and practitioners, who insist that it is a universal end-state characterised by rights-based institutionalism, ensure that operational missions are directed to unrealistic goals. While interventions may take steps to restore a basic level of security, the rule of law in a real sense will not be achieved. That is essentially because the rule of law is not an end state,⁴ nor is it universal, nor is it necessarily fixed. It is instead an ongoing dialogue among the people who are its subjects, which must be preceded by the establishment of a sufficient level of security for the conversation to commence.⁵

¹Thomas Carothers, ‘The Rule-of-Law Revival,’ in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p3), p3.

²United Nations Commission on Global Governance, *Our Global Neighbourhood*, Oxford University Press, Oxford, 1995, p303.

³The ‘rule of law’ has been seized upon, but not clearly defined, in international discussions about both unilateral and multilateral interventions in Palestinian occupied territories, in Iraq, East Timor, Kosovo, Afghanistan and earlier in Somalia during the 1990s and Cambodia: see further, Jeremy Matam Farrall, *United Nations Peacekeeping and the Rule of Law*, Issues Paper No. 1, Australian National University Centre for International Governance and Justice, March 2007, especially pp4-5. It is not always raised in the initial authorisation for intervention, but regularly emerges as a subsequent mission goal, as it did in Iraq and Somalia.

⁴In this thesis, the rule of law ‘end state’ is one which demonstrates the institutional forms, and rules based on human rights, which are said of themselves to comprise the rule of law. Theories which postulate the rule of law as an ‘end state’ assume that there is a single and immutable system which is the rule of law, so that once those features are realised, so is the rule of law. This is considered further in Chapter One below. Chesterman defines the problem as seeing the rule of law “as a means rather than an end, as serving a function rather than defining a status.” Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 *Am J Comp L* 331, at 331.

⁵This is an emerging school of thought, but one whose nuances appreciate the realities of intervention and explains the shortcomings in Iraq and other countries. Its key advocate is Nardin: Terry Nardin, ‘Theorising the International Rule of Law’ (2008) 34 *Rev of Intl Studies* 385. It is to be compared with the traditional schools of formalism and rights-based substantivism, and the current ‘ends-based’ institutionalist view fostered by intervention practitioners and academics such as Kleinfeld and

Its form may differ as a result of a range of cultural, religious, economic, social or other variables. As non-participants in the domestic legal system, interveners cannot create or impose such a relationship,⁶ although by their example they might guide it.⁷

The aim and purpose of this thesis is to ascertain the state of the law with respect to rule of law operations. However, a project of this scope necessarily requires two directions of inquiry. Firstly, at a theoretical and a systemic level, what is the accepted meaning of the phrase 'rule of law,' for both practitioners and scholars? What does deconstructing this accepted definition mean for what military forces might call the 'doctrine' of rule of law intervention, or its general mission and practice? Secondly, is this accepted meaning of the rule of law reflected in the specific bodies of rules which govern military interventions? If it is not, what role does that body of law ascribe both to the accepted definition or other possible concepts of the rule of law? What are the consequences for the character of intervention in judicial or other legal institutions? Both avenues of discussion require deconstructing a web of assumptions about the relationship between economic development, order, security, judicial institutions and the rule of law.

Therefore, the thesis proceeds in two general parts. The first, Chapter One, addresses the preliminary issue of the concept of the rule of law. It compares traditional academic literature with emerging practitioner views on a rule of law blueprint,⁸ non-law theories such as law and economics, and finally, the emerging and more nuanced view of the rule of law as community self-ordering, or an internal relationship, on the basis of law.⁹ This theoretical discussion of the rule of law is compared to its expression in international human rights law, ahead of the second

Stromseth and her colleagues: Rachel Kleinfeld, 'Competing Definitions of the Rule of Law,' in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p31); Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006.

⁶Chesterman, above n4, at 341-2; Jonathan Charney, 'Universal International Law' (1993) 87 *AJIL* 529, at 533; Stromseth et al, *ibid*, p65, who also discuss the immunity of other 'outsiders': international organisations, especially UN agencies, international donors and non-government organisations, who are "those most actively involved in promotion of rule of law."

⁷Chesterman, *ibid*, at 349, referring to UN Mission in Kosovo *Regulation 1/1999: On the Authority of the Interim Administration in Kosovo*, entered into force 7 September 1999. Stromseth et al, *ibid*, make this point more generally, arguing that the credibility of the intervener depends on their own adherence to rule of law principles (which they conflate with human rights protection) during the intervention: p4.

⁸See n5 above.

⁹See Nardin, above n5.

part of the thesis which analysis it in the context of the law of intervention. It is significant that the human right to a fair trial is considered derogable in times of emergency, yet the absence of traditional judicial institutions capable of administering it is considered a fundamental rule of law failing in any situation.

The currently accepted meaning of a system of law based on certain rights-based judicial and other institutions is challenged in practice and theory. Examined from the viewpoints of language and culture, its claim to universal forms or values must be rejected in favour of understanding the rule of law as a society's choice of self-ordering based on law, without *necessarily* meeting any institutional forms. However, it is argued, the structure of global legal systems, in which independent states with their own legal forms participate in a unitary international legal structure, means that for the higher level to establish its own coherent principles, it requires a minimum measure of principled consistency among its constituents. The effect is the mandating for states of the form of the rule of law represented internationally, leading to pressure for intervention in non-compliant states. It should be noted that the present international conception of the rule of law need not be static, and rights-based institutionalism may give way to another paradigm in the future – indeed, this is the logical result of understanding the rule of law as a relationship – but the pressure for global consistency remains.

The second part of the thesis, Chapters Two-Four, examines closely the concept of the rule of law which military operations embody; the scope to intervene, perhaps permanently, in domestic judicial systems; and the efficacy of such intervention in achieving the rule of law, both as commonly understood and in its proper conception. The methodology employed is an analysis of actual interventions conducted under occupation law or by authority of the UN Security Council, which attempted to achieve rule of law outcomes. These have emerged most strongly since the Second World War and the study concludes with the end of the final Security Council mandate in Iraq under Resolution 1790 (2007) on 31 December 2008, the most recently concluded 'rule of law operation.' The law stated is correct as at January 2009.

The analysis of state practice divides intervention under the formal aegis of occupation, from those authorised by the Security Council. Chapter Two analyses the

extent to which occupation law, as the traditional field of international law governing military control of foreign territory, is concerned with the rule of law, however understood. Chapter Three considers the consequences of occupation law's preference for security above the rule of law, amounting to a de facto recognition of the rule of law in its proper conception, and interrogates the scope of authority to intervene in domestic judicial systems under occupation.

The period of analysis emphasises four main periods of occupation: German and Japanese occupation of territory during the Second World War, and Allied occupations of Germany and Japan on its conclusion; the Israeli occupation of parts of neighbouring states, especially the areas in East Jerusalem, on the West Bank of the Jordan River and in the vicinity of Gaza; and the US-led Coalition's occupation of Iraq in 2003-04. Although weight should be given to the most recent example in Iraq, and the variety of measures taken there with the rule of law clearly in mind, it should not be at the expense of the wealth of earlier practice. The foci of this study span the breadth of short to very protracted occupations, and a range of institutional interventions prompted by necessity and by desire to improve or reshape domestic structures which were ineffective or judged criminal.

The fourth chapter focuses on interventions under Security Council authority, in particular the linkage between security, the rule of law and power to effect permanent change in the domestic judicial system under the aegis of the 'rule of law.' It addresses the initial question of whether the absence of rights-based rule of law has been, or could be, used as itself a ground for military intervention, then considers the different forms of intervention the Security Council has authorised. In particular, the chapter focuses on interventions where the rule of law, conceived in its standard rights-based institutionalist form, has been part of the interveners' mandate. This reaches its pinnacle in UN transitional authorities, especially in Timor and Kosovo, but has also affected other missions less than assuming governmental control. Under this lesser authority, the case of Iraq stands out. Although the Iraqi authorities requested Security Council authority for intervention, the widespread public rejection of both the intervention itself and measures taken in overt pursuit of the 'rule of law' by Coalition and Iraqi participants alike (building on the questionable circumstances of the initial occupation) shed great light on the role of

legitimacy in the formation of a genuine rule of law relationship. It highlights the problems that reliance on a misconception of the rule of law can produce when applied militarily.

A case study of the situation in Iraq since 2003, spanning both occupation law and Security Council involvement, demonstrates the powers and pitfalls of would-be 'rule of law operations.'¹⁰ The 'rule of law' was not directly appealed to as a justification for the US-led intervention there, beginning in March 2003, which lacked clear authority from the UN Security Council. This was despite longstanding evidence of human rights abuses against Shi'ites and Kurds in particular, and the establishment of the extraordinary Revolutionary Court during the Ba'athist regime of Saddam Hussein.¹¹ Instead, protagonists argued that Iraq was in possession of weapons of mass destruction contrary to previous Security Council Resolutions and that earlier Security Council authority could be relied upon for the 2003 invasion.¹²

¹⁰In this thesis, a 'rule of law operation' is one which has a self-conscious program to create, improve or administer the 'rule of law' in the area of intervention. This may occur through occupation, where the occupant declares itself to be acting for the benefit of the rule of law, such as in the occupied Palestinian areas since 1967 and Iraq in 2003-04 (although neither considered rule of law activities their exclusive focus – see further Chapter Three below), or by the authority of the UN Security Council, which may have listed the absence of the rule of law as a justification for intervention or its creation as an outcome of the intervention, as occurred in Iraq (2004-08): see Farrall, above n3. However, in the latter case, it will become apparent that the Security Council rarely refers explicitly to the rule of law, and it is adopted as part of a broader mission, particularly where the UN acts as a Transitional Authority as it did in Cambodia, Kosovo and East Timor: see Chapter Four below.

¹¹See for example Charles Tripp, *A History of Iraq*, 3rd Edn, Cambridge University Press, Cambridge, 2007, pp234-250, and Chief Judge Medhat al-Mahmoud, 'The Judicial System in Iraq: A Review of the Legislation Regulating Judicial Affairs in Iraq,' *Iraqi Judicial Forum: The Judicial System in Iraq, Facts and Prospects*, Baghdad, 2004.

¹²In fact, the major protagonists on the Security Council differed strongly on the legality of the war. None of the major Coalition participants (see note 9 below) relied on self-defence, arguing instead that Iraq was in 'material breach' of UNSC Resolution 687 (1991), which had provided for its disarmament and the end of the First Gulf War. This was argued to justify reactivating the original authority to use force against Iraq in that war in UNSC Resolution 678 (1990). The same argument was relied on for interventions in Iraq in 1998. However, several Security Council members took objection, including France and Russia, and a compromise Resolution 1441 (2002) recognised that Iraq was in "material breach" and warned of "serious consequences" if it continued. For a detailed review, see Stromseth et al, above n5, pp47-9.

In any case, the Coalition¹³ declared on 8 May 2003 that it was in occupation of Iraq under international humanitarian law and created the Coalition Provisional Authority (CPA) to govern until it transferred authority to the Interim Iraqi Government on 28 June 2004.¹⁴ Thereafter, at Iraqi request, the Coalition, in the guise of the Multi-National Force – Iraq (MNF-I), remained with an expansive Security Council mandate to restore security in the country.¹⁵ Despite the fact that during initial Coalition military actions in Iraq, most legal infrastructure was destroyed, court records lost or destroyed and detention facilities proved unable to hold all those detained,¹⁶ these issues were not explicitly addressed in the authorisation of MNF-I.

To varying extents explored in the following chapters, Coalition forces in fact intervened in the Iraqi judicial system with a view to creating the rule of law and therefore security across the country. Their focus was on purging government service of Ba’athist elements (as had occurred with Nazis in Germany and individuals judged as militarist nationalists in Japan) and establishing two outposts of their flagship institution, the Central Criminal Court of Iraq, during and after occupation. Notwithstanding a jurisdictional focus on terror-related crimes, the structural reforms were intended to be permanent and to address day to day legal affairs.¹⁷ Coalition

¹³According to the United States Government Accountability Office, Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, US House of Representatives: “In March 2003, a US-led multinational force began operations in Iraq. At that time, 48 nations, identified as a ‘coalition of the willing,’ offered political, military, and financial support for US efforts in Iraq, with 38 nations other than the United States providing troops.” The latter included the United Kingdom, Poland, Republic of Korea and Australia. See the Statement of Joseph A. Christoff, Director International Affairs and Trade, *Stabilizing and Rebuilding Iraq: Coalition Support and International Donor Commitments*, GAO-07-827T, release dated 9 May 2007, available at <http://www.gao.gov/new.items/d07827t.pdf>, viewed 6 October 2009.

¹⁴Letter dated 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538), recognised in UNSC Resolution 1483 (2003).

¹⁵UNSC Resolution 1546 (2004).

¹⁶Center for Law and Military Operations, *Rule of Law Handbook*, Charlottesville (VA), 2007, pp8, 116 and 126; John C. Williamson, ‘Establishing the Rule of Law in Post-War Iraq: Rebuilding the Justice System’ (2004) *GaJ Intl & Comp Law* 229, at 232-3; Stromseth et al, above n5, pp365-6.

¹⁷*Coalition Provisional Authority Order 13 – The Central Criminal Court of Iraq (Revised) (Amended)*, entered into force 22 April 2004, establishing the Central Criminal Court, had no end date, and was preserved at the transfer of authority to the Iraqi Interim Government on 28 June 2004 (*Coalition Provisional Authority Order 100 – Transition of Laws, Regulations, Orders and Directives Issued by the Coalition Provisional Authority*, entered into force 28 June 2004). In country-wide terms in Iraq during 2005, US\$400 million in 2005 was being spent by “multiple [US] federal agencies for rule of law programs,” with another US\$1 billion for police training, US\$300 million for justice infrastructure and US\$100 million for “a variety of capacity-building programs.” United States Department of State, *Inspection of Rule-of-Law Programs*, Embassy Baghdad, 26 October 2005, available at <http://oig.state.gov/lbry/reporhighlights/57056.htm>, viewed 8 September 2009.

forces while in occupation also devoted effort to transitional justice, to try and punish those responsible for major crimes committed by the deposed regime.¹⁸

Between 2003 and 2008, both outposts of the Central Criminal Court of Iraq were significantly hampered in their day to day proceedings by lack of security and by criticisms of the genuineness of the ‘rule of law’ they administered from their inception. A significant focus of criticism was the involvement of Coalition forces in the creation and administration of domestic judicial institutions at all. After 31 December 2008, MNF-I was much more limited in authority by the terms of its agreement with Iraq on the terms of its continued presence, and direct rule of law participation ceased.¹⁹

Following the pattern established by earlier interventions in Somalia, Cambodia, East Timor and Kosovo, the case of Iraq and its new Central Criminal Court highlights the problematic assumptions made about the rule of law in international discourse. Despite a compelling lack of academic agreement about the meaning of the phrase, international law has adopted a single, universal rights-based ‘rule of law’ which depends on democracy and recognisable court institutions.²⁰ The concept is so ingrained that authorising Security Council Resolutions tend to provide only the briefest of warrants for rule of law activities.²¹ Rather, they grant authority

¹⁸Transitional justice, meaning the imposition of accountability for crimes committed by the deposed regime, is said to be an essential requirement for the society to (re)create the rule of law: David Tolbert and Andrew Solomon, ‘United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies,’ (2006) 19 *Harv Hum Rts J* 29, at 34. However, when it is sought to be achieved by intervention, it is often the domestic community which participates least, for example through Security Council-authorized international ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda or through mixed national international tribunals as in Sierra Leone and Cambodia (Tolbert and Solomon, pp36-40). Some practitioners dispute the need for intervention in transitional justice, suggesting it is the better province of the domestic community: Mark Plunkett, ‘Rebuilding the Rule of Law,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p207), p213.

¹⁹*Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq*, 17 November 2008, Baghdad, entered into force 1 January 2009, available at https://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf, viewed 6 October 2009.

²⁰See for example, Stromseth et al, above n5; Kleinfeld, above n5.

²¹Kelly argues that this is a consequence of the nature of the Resolution as a ‘brief warrant’ legitimising an intervention which is intended to be supplemented in the ordinary course by either the general body of international law (and Kelly identifies occupation law as the appropriate corpus of rules) or a “detailed framework agreement,” presumably involving the host state: Michael Kelly, ‘Military Force and Justice’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p229), p231, reference omitted. For example, the UN Transitional Authority in East Timor (UNTAET) was to exercise “all legislative and executive authority, including

for broad activities such as “all necessary measures” to restore security, in which the rule of law is included because of its assumed relationship to order.²² This can be compared with an explicit focus on order in occupation law and its limited concern with the rule of law as a uniform idea in practice.²³ The practical result of occupation is a better condition for the formation of the rule of law, properly conceived, than broader Security Council efforts continuing the popular misunderstanding.

That said, Security Council operations take place in a reasonably well-defined mission continuum. The spectrum commences with peace-making (predominantly a diplomatic task),²⁴ as opposed to peacekeeping (which has since 1945 developed into “a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars” as well as traditional ceasefire observation between warring states).²⁵ In between is the more recent phenomenon of peacebuilding, in which the mission post-conflict is “to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war,” including by “strengthening the rule of law,” democracy and human rights.²⁶ This labelling of mission outcomes is important. Kelly focuses on the “interim administration of justice at the communal level” and the potential future scope for military operations in “support” of the International Criminal Court, preferring this to attempts to create the rule of law per se.²⁷

the administration of the judiciary.” Article 1, UNSC Resolution 1272 (1999). However, it is suggested that it is the assertion of a universal understanding of, and desire for, the rule of law, which makes it apparently unnecessary to elaborate the character of activities that might be undertaken.

²²See, for example, UNSC Resolution 1546 (2004) in Iraq.

²³Article 43, *Annexe to Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land*, 18 October 1907, The Hague, (1908) 2 *AJIL* Supplement 90-117, entered into force 26 January 1910 (“Hague Regulations”); Article 64, *Convention IV Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Geneva, 75 UNTS 287, entered into force 21 October 1950 (“Geneva IV”). See Chapters Two and Three, which demonstrate the limited inclusion of rule of law measures in the security jurisdiction. This is to be compared with the broader interpretations of Security Council authority in Chapter Four.

²⁴Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, A/55/305 S/2000/809, United Nations, 2000, (“Brahimi Report”), para 11.

²⁵*Ibid*, para 12.

²⁶*Ibid*, para 13-14. An intervention may take different forms throughout its life as the situation develops, relying alternately on Chapters VI (non-coercive measures) or VII (coercive measures) of the *Charter of the United Nations*, 24 October 1945, San Francisco, 1 UNTS 41, entered into force 1 November 1945 (“UN Charter”).

²⁷Kelly, above n21, p229. Helen Durham also uses these terms without looking to the ‘rule of law.’ Helen Durham, ‘Mercy and Justice in the Transition Period,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p145).

In the result, the continuum is practically dominated by the emergence of some human rights as rules of *ius cogens*, meaning they cannot be derogated from (among other limitations),²⁸ and as obligations *erga omnes*, imposing obligations of intervention on other states.²⁹ This overriding obligation regarding some human rights leads to the assertion that the domestic legal regulation of a community is becoming subject to international oversight, potentially through military intervention. Its nascent application to rule of law theory is demonstrated by the recognition of Nazi and Iraqi Ba'athist judicial activity as internationally criminal *as a system* when it did not meet certain rights and procedural standards.³⁰ The altruistic motivation behind the emerging 'responsibility to protect' doctrine,³¹ when applied to rule of law intervention, would rely on this approach.

The point is central to the notion of sovereignty since the authority to make and enforce laws, through a legal system, is historically the key feature of the state.³² The consequence of domestic judicial criminality, if addressed through foreign military intervention, is necessarily a fundamental challenge for the legitimacy of domestic judiciaries. Further, it must be recognised that while rule of law practitioners demand a rights-based blueprint, and international players call to the same concept, extant international law actually permits derogation of many rights, including the right to a fair trial, in times of emergency.³³

The international system continues to adopt the fundamental equality of sovereignty among its constituent states, the inviolability of domestic affairs and

²⁸Including, for example, the right not to be arbitrarily deprived of life and not to be subject to torture: Article 4, *International Covenant on Civil and Political Rights 1966*, adopted by General Assembly Resolution 2200 of 16 December 1966, A/RES/2200A XXI, 999 UNTS 171, entered into force 23 March 1976 ("ICCPR"); Jaime Oraá, 'The Protection of Human Rights in Emergency Situations under Customary International Law' in Guy Goodwin-Gill and Stefan Talmon (Eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999 (p413), p433.

²⁹See *Barcelona Traction, Light and Power Company Ltd (Second Phase)* [1970] ICJ Rep 3.

³⁰*US v. Altstötter et al.*, (1948) 3 TWC 1 ("Justice Trial"); *Case No. 1/9 First/2005 al-Dujail Case*, Iraqi High Tribunal, 2006 ("Dujail Trial"), judgment translated unofficially from Arabic to English by Mizna Management LLC, available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>, viewed 6 October 2009.

³¹For a general background, see Robert Jackson, *Sovereignty: Evolution of an Idea*, Polity Press, Cambridge, 2007, pp128-134; Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia, 1996, pp8-20.

³²For example, Article 3, *Convention on the Rights and Duties of States*, adopted by the Seventh International Conference of American States, 26 December 1933, Montevideo, 165 UNTS 19, entered into force 26 December 1934.

³³Including Articles 4 and 14, ICCPR.

“self determination among peoples” as core principles.³⁴ It is an odd result that it effectively also demands institutional rights-based uniformity for the rule of law across states, without broad regard for historical, cultural or religious considerations. The emphasis on such uniformity in court structures, judicial process and the level of judicial independence, not only from the cause but from social or religious values, leads regularly to international pressure on non-conforming states on human rights grounds, not just from aid donor states or states whose nationals may be under prosecution, but from the general community. That there have been occasions of intervention by foreign states, albeit not unanimously approved,³⁵ which have aimed to achieve this kind of uniform rule of law as part of their mission is even more odd.

The demand for universal consistency fails when the domestic rule of law is properly understood as the manner in which a society determines its own legal order.³⁶ However, uniformity is the only thing that can give the *international* rule of law coherence – there can be no consistent expression of the rule of law in the international legal system if the system’s participants do not uniformly mirror the values of that system internally. Additionally, the developmental model of the rule of law aims at institutional uniformity to assist in expanding free market democracy, and, since democracies rarely war with each other, international peace and security.³⁷ Rule of law interventions at the international level are therefore best understood as structurally self-serving, rather than in support of an independent value of the rule of law.³⁸

What interveners can create is order and security, through lawful and authorised measures which fall short of the demanded international rule of law

³⁴Articles 2(1, 2 and 7), UN Charter. See also Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, Palgrave, New York, 2001, p145.

³⁵Germany, for example, considers the development of the rule of law a purely internal affair, while the international community’s task in intervention is economic reconstruction: Joschka Fischer, Minister for Foreign Affairs, Speech at the Afghanistan Support Group (2001), cited in *Rule of Law Handbook*, above n14, p45 (note 44).

³⁶However, the link between democracy (rule of law) and peace is not well-defined and there is little proof about “the independent or causal role of law in either sociological evolution or economic growth.” Thomas C. Heller, ‘An Immodest Postscript,’ in Erik G. Jensen and Thomas C. Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p382), p386.

³⁷*Ibid*, p384; see also Carothers, above n1, p5; Charney, above n6, at 529.

³⁸Notwithstanding that intervening States may claim moral and ethical justification in situations where the abuse of human rights through torture, extra-judicial executions and genocide is egregious. See further Stromseth et al, above n5, p4 for a discussion on the intervener’s need to maintain “global credibility” by engaging in rule of law reform.

standard, such as special military courts and administrative detention for security purposes.³⁹ This is so whether they act as occupants or with a broad Security Council mandate. Creating security is a condition precedent to the community developing its own rule of law, and it is here where the focus of intervention must be directed. International expertise and assistance may later be provided to the emerging domestic rule of law relationship. However, given the self-interested need of international law in uniformity, and having mistakenly selected rights-based, democratic institutionalism as its method, it seems unlikely this gap between rule of law rhetoric and the reality of interventions can be bridged.

³⁹Indeed a link to “international peace and security” is necessary to enliven the Security Council’s jurisdiction to authorise non-consensual intervention under Article 39, Chapter VII of the UN Charter.

CHAPTER ONE:

THE RULE OF LAW IN INTERNATIONAL LAW – A REASSESSMENT

It is trite to acknowledge the fundamental lack of clarity about the ‘rule of law,’¹ but it becomes a high risk with the proliferation of military interventions designed to achieve it through ‘rule of law operations.’² The confusion arises because theorists and practitioners alike are focussed on determining the parameters of the rule of law as a universal result or an end-state. The provision of a checklist of institutions for an intervener may provide an apparently useful mission plan, but it does not (and cannot) address the fundamental question of legitimacy or make legitimacy and social acceptability a measurable outcome. This is the essence of the problem when the rule of law is accepted as a relationship or process within the subject community without necessary end-state characteristics. Properly understood, a rule of law mission is not capable of measurable outcomes for the military intervener, of their nature external to the community, because legitimacy is an internal measure. Focussing on it distracts resources and time from efforts to restore public order and it is necessary now to deconstruct and reject traditional, but ultimately unhelpful, understandings of a universal rule of law.

To that end, this chapter reviews the substantial and growing body of literature which attempts to define the rule of law at national and international levels, both of which for reasons of structural coherence are currently defined in substantive human rights terms. An essential tension will become apparent in the course of this study: the international rule of law depends on consistent domestic rules of law for its own existence and credibility. There is a logical disjunct between an international rule of law and domestic rules of law because the two must share the same concept of the rule of law for either claim to be true, but to achieve this in a world based on

¹For example, H.W. Arndt, ‘The Origins of Dicey’s Concept of the Rule of Law’ (1957) 31 *Aust LJ* 117.

²See Introduction. In this thesis a rule of law operation is one which intervenes in the domestic judicial structure with an avowed purpose of constructing the ‘rule of law.’

nation states the former must control the latter in a manner inconsistent with the rule of law itself, properly understood.

Analysing why and how international law is concerned with the rule of law, considering both what theorists say it means and what accepted international law says it means, assists in explaining the phenomenon of ‘rule of law operations’ conducted by armed interveners and their particular focus on creating, recreating or reconstructing domestic legislation and the national judiciary along certain familiar lines. These interveners espouse the substantive definition of the rule of law adopted by international law, including implementing individual human rights and strengthening principled judicial and democratic institutions; however, their success is generally at the procedural and value-free level,³ schools of thought considered below. It is therefore necessary to understand each view and its place in current international law.

1.1 Rule of Law Theories: A Review

During the ancient period of rule of law theorising, law was a permissive means of ruling.⁴ However, modern rule of law theory, usually traced to the Magna Carta, focuses instead on procedural limitations imposed by law on the exercise of sovereign power.⁵ At this point, ambiguity begins to emerge in the conceptualisation of the rule of law. For the people, limited legislative power in the sovereign was felt to be liberation from repressive government, however, the concept of ruling itself requires the exercise of authority over the people.⁶ The concept of law as authority permeates rule of law theory; defining the ‘rule of law’ thus depends on the definition of ‘law,’ and of ‘rule,’ as well as the implication of a rule ‘of’ law.

³Erik G. Jensen, ‘The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses,’ in Erik G. Jensen and Thomas C. Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p336), p339.

⁴For Plato, ‘rule by law’ was a suitable second alternative to rule by a philosopher king: *The Republic*, 715d (translated by Trevor J. Saunders, Penguin, 1970); Aristotle took the opposite view, based on a range of Greek constitutions, preferring ‘rule of law’ rather than the subjection of law to any individuals authority: *The Politics*, III.16 (translated Benjamin Jowett, Nuvision, 2004).

⁵Professor W.T. Eijsbouts, ‘Introduction,’ in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p3), p3.

⁶*Ibid*, p5.

The bulk of pure rule of law theorists since Plato can be uncontroversially divided into two camps: formalists (proceduralists), who are not interested in the content of the law but only in certain procedural requirements to identify and apply it, and substantivists. These are also known as the “thin” and “thick” concepts of the rule of law, respectively.⁷ Substantivists accept formal procedural requirements, but demand that the content of the laws and legal system meet identified values. The divergence of views on what the specific values should be means that a single substantive theory cannot be extracted from the debate.⁸

To some extent, the procedural/substantive debate about the rule of law mirrors the broader positivist/natural law debate. Beginning with a rudimentary definition of law as rules, a legal system can be understood as a system of general rules deriving from authority.⁹ However, the requirement for rule-making authority necessarily requires that participants in the rule-making process, whether democratic representatives or otherwise, are constrained by the nature and limits of the authority. This idea of normative constraint on officials is identified as the essence of the rule of law.¹⁰

1.1.1 Formalism

The constraint of officials is addressed procedurally, by the existence of rules about the system for making law, the clarity of the law itself, and the temporal scope of its application.¹¹ To amount to the rule of law, they must be sufficiently certain to allow legal subjects to plan their lives in accordance with them.¹²

⁷See Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 *Am J Comp L* 331, at 340.

⁸Douglas J. Simsovic, ‘No Fixed Address: Universality and the Rule of Law’ (2008) 35 *RJT* 739, at 751. Chesterman would add a third group, functionalists, who are not interested in rules or their implementation but “a kind of political ideal for a society as a whole:” above n7, at 332. However, the same problem arises - it is difficult to distinguish Chesterman’s functionalists from the broad spectrum of values all broadly directed to the achievement of liberal, free market democracy, put forward by substantivists.

⁹See for example, H.L.A. Hart, *The Concept of Law*, 1907 (2nd Edn, Clarendon Press, Oxford, 1994).

¹⁰Terry Nardin, ‘Theorising the International Rule of Law’ (2008) 34 *Rev of Intl Studies* 385, at 392, emphasis added. See also Chesterman, who distinguishes this kind of system from one of rule *by* law, but prefers to describe a principle of equal and non-discriminatory rather than general application of law, summing his three-point view up as “government of laws, the supremacy of the law, and equality before the law: above n7, at 342. Although phrased differently, each formal definition is essentially the same.

¹¹Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 467, at 467; Charles Sampford, ‘Reconceiving the Rule of Law for a Globalizing World’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p9),

Predictability in the formal rule of law requires publication and congruent interpretation of rules, and penalties for breaches, whether committed by individual citizens or by officials exercising state authority; or more broadly, a pre-agreed system of dispute resolution about the content and application of rules. Such dispute resolution is to be administered by impartial and independent tribunals, after the grant of procedural fairness.¹³ It follows on this theory that a “recognized, organized, and independent legal profession” must also exist to facilitate this process. This is Summers’ “institutional and axiological core” of the rule of law.¹⁴

Formalists at no point insist on any particular content of rules, although their institutional analysis seems largely descriptive of the Western legal tradition; they accept that a ‘wicked legal system’ may satisfy the rule of law,¹⁵ but recognise that wicked laws and disregard of the formal rule of law often exist together.¹⁶ This deliberate amorality and apoliticality has claimed advantages, including a “unified focus” to identify and create the rule of law through essential institutions, chiefly a procedurally constrained rule-maker and an independent judiciary.¹⁷ Its source-orientation is said to offer greater certainty than systems with substantive content, which tend to rely on non-specific and mutable values such as ‘due process.’¹⁸ The claim is alternatively formulated as having a greater appeal to universality.¹⁹

p14. Thin theorists include F.A. Hayek, *The Road to Serfdom*, University of Chicago Press, Chicago, 1944 (1976); Lon Fuller, *The Morality of Law*, Yale University Press, New Haven, 1964 (1969); R.A. Cass, ‘Judging: Norms and Incentives of Retrospective Decision-making’ (1995) 75 *Boston Uni LR* 954, at 960. To these constraints may be added interpretative method: see further Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008, on the deliberate choice of civil law, with its mechanical interpretative method and this ‘thin’ approach to the rule of law, as a means of constraining judge-made law, at p19.

¹²Craig, above n11, at 469; Cass, above n11, at 960, for whom “principled predictability” allows ‘fair warning’ of enforcement, leading to adjustment of behaviour and lowered decision costs.

¹³Robert S. Summers, ‘A Formal Theory of the Rule of Law’ (1993) 6(2) *Ratio Juris* 127, at 129.

¹⁴*Ibid*, at 131. Tolbert and Solomon also argue that “functioning courts and a judiciary system” are “axiomatic” for the existence of the rule of law: David Tolbert and Andrew Solomon, “United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies,” (2006) 19 *Harv Hum Rts J* 29, at 45.

¹⁵Craig, above n11, at 469, discussing Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 94 *LQR* 195.

¹⁶Summers, above n13, at 139. For example, extensive rule by executive fiat in Nazi Germany or in Ba’athist Iraq in the later years of each regime, rather than through the legislature.

¹⁷*Ibid*, at 135.

¹⁸*Ibid*, at 132.

¹⁹*Ibid*, at 136. And see Thomas Carothers, ‘The Rule-of-Law Revival,’ in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p3), p7.

This view is not supported by the groundswell of public opinion against regimes in the Soviet Union, South Africa and East Germany, including aspects of their legal organisation overthrown by their own subjects, which prompted a new revolt against the notion that all certain and predictable legal systems were equally lawful.²⁰ To these may be added regimes which are subject to intervention from other States in the sole or part pursuit of internal rule of law. Further, the emphasis on certainty and predictability in formalism runs the risk of confusing certainty of rules with a sense of physical security within law. Appeals to the rule of law during colonial rule in the penal colony of New South Wales, expressed in principles such as “control of the king by Parliament, the right to petition, the rule of law and trial by jury gave the unenfranchised security consistent with the idea of a free society,”²¹ but not the freedom itself which was sought.

1.1.2 *Substantivism*

Formalism assumes that adopting correct procedures results in formal justice or its Anglo-American cognate *fairness*.²² However, adopting an objectively fair procedure to provide a precisely equal opportunity to disputing parties, such as flipping a coin, does not produce the desired result,²³ because there is an intuitive desire for some further institutional characteristic allowing determination, under universal laws prevailing generally, whether the particular case meets exactly the situation dealt with under law. This is what makes it positively just, as opposed to not unjust. These characteristics have been described since Aristotle as distributive, corrective, retributive and commutative, and are substantive not procedural.²⁴ They are the concern of theorists who do not accept institutional formalism as a complete explanation of the rule of law.

²⁰George P. Fletcher, *Basic Concepts of Legal Thought*, Oxford University Press, Oxford, 1996, p38. Importantly, while in each case aspects of the legal organisation were rejected and considered void, others were upheld or continued, indicating the role of political shifts in the change.

²¹David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge University Press, Cambridge, 1991, p33, citing E.S. Morgan, *American Slavery, American Freedom*, Norton, New York, 1975, pp60-1.

²²Fletcher, above n20, p81; Ronald Dworkin, *Law's Empire*, Hart Publishing, Oxford, 1998, p225 et seq (“law as integrity”).

²³Ibid.

²⁴Ibid, pp80-1.

Substantivists require not just the enactment of certain substantive rights but argue that the existence of such rights precedes law, and therefore rules must express these moral and political rights if they are to be law at all.²⁵ A leading proponent, Dworkin, demands positive recognition of individual rights, enforceable on individual request through “familiar” judicial institutions. This rule of law, he argues, is “the ideal of rule by an accurate public conception of individual rights.”²⁶ Aside from the articulation of justice, there is not a great deal of difference in the institutional focus of the two schools thus far. Both insist that there be familiar legislation, courts and trial processes, differing only in the overt inclusion of rights-based values.

From the practitioners’ perspective, Stromseth, Wippman and Brooke adopt what they call a “descriptive and pragmatic” definition of the rule of law, an admittedly substantive but minimalist concept including only the most universally recognised human rights.²⁷ They make a number of concessions to modern reality. In particular, they argue that a rule of law state must control “the means of violence” since insecurity and the rule of law are antithetical.²⁸ Further, they acknowledge an element of “cultural commitment” by requiring citizens to choose to accept their system.²⁹ Finally, they recognise a pragmatic necessity for recognisable institutions such as courts, consistent with other nations in a globalised world, although their dispute resolution only need be “consistent with rules and rights” rather than

²⁵Simsovic, above n8, at 752.

²⁶Ronald Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge Massachusetts, 1985, pp11-12. John Rawls, also concerned with justice rather than the rule of law explicitly, favours certainty achieved through four principles: firstly, rules must be comprehensible and observable; secondly, determinacy requires a system of treating like cases alike (ie generality); thirdly, prospective application of criminal law; and the fourth, natural justice as “as a necessary aspect of the rule of law,” since it serves to preserve the integrity of the judicial system. Only the fourth adds to formalism but Rawls defines natural justice to include an independent and impartial judiciary as well as open and fair trials: John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge Massachusetts, 1971, pp236-239. Raz sought the same outcomes through “principled faithful application of the law” by the judiciary to ensure coherence and to limit “majoritarian democracy,” although his view of democracy and its impact on the rule of law differs sharply from the traditional view that the preservation of individual rights is the purpose of democracy: Joseph Raz, *Ethics in the Public Domain; Essays on the Morality of Law and Politics*, Clarendon Press, Oxford, 1994, pp373-5; and see Craig, above n11, at 484-5.

²⁷Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006, p78.

²⁸Ibid.

²⁹Ibid.

necessarily compulsory court-based resolution.³⁰ From their theory, it appears that Stromseth, Wipman and Brooke are critical of the notion that the rule of law itself requires traditional court-based dispute resolution, but they acknowledge pragmatically that the exigencies of participation in the modern system of global law do require courts in familiar form as an institutional baseline upon which to interact with other states, persons and corporations.

1.1.3 Tension between Strict Formalism and Substantivism

The distinction between the two schools is not absolute: most theorists agree that views which are avowedly proceduralist are predicated on a substantive content as well.³¹ Even strict formalists predicate their rule of law on the moral autonomy of the individual.³² For example, there is some dispute as to whether the mutually essential institution of the independent court-based judiciary is a procedural or a substantive requirement. Even if the view of the purest of rule of law formalists, who have proceduralism simply as government “bound by rules fixed and announced beforehand,”³³ is accepted as true, it can easily be translated into rights discourse, as a right not to be subject to penalty for an act not proscribed at the time or a right to do that which is not proscribed by rules - yet rights are construed as substantive not procedural aspects of law.³⁴

³⁰Ibid, pp78-81. Helen Durham, ‘Mercy and Justice in the Transition Period,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p145), p147, largely agrees. As to commitment or local ‘buy-in,’ see Michael Kelly, ‘Military Force and Justice’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p229), p243, who is particularly focussed on what he calls the “public security function” which includes the judiciary but does not solely comprise it, with police and other social institutions as critical to the outcome. Plunkett emphasises courts more strongly: Mark Plunkett, ‘Rebuilding the Rule of Law,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p207), p223.

³¹Simsovic, above n8, at 751.

³²Fallon considers this “covert” inclusion of substantive elements: Richard H. Fallon Jr, ‘“The Rule of Law” as a Concept in Constitutional Discourse’ (1997) 97 *Columbia LR* 1, at 54 (FN260) and the references he cites.

³³For example, Antonin Scalia ‘The Rule of Law as a Law of Rules’ (1989) 56 *Uni Chicago LR* 1175; Raz, above n15.

³⁴See further Craig’s discussion of whether the prohibition on arbitrariness is substantive (preserving fundamental rights of individual freedom) or substantive (prohibiting punishment without the colour of law): above n11, at 470-3.

1.1.4 *Functionalist, Ends-Based Rule of Law Thinking*

This tension has driven Chesterman to conclude that a coherent understanding of the international rule of law really requires a formal minimalism and a functional understanding of how it applies to an international legal system that places subjects not in a vertical relationship to a legislative body but in a horizontal relationship.³⁵ He and other modern theorists seek instead to identify the precise ends which comprise the rule of law. Kleinfeld has defined the school most clearly to date, requiring:

1. Government bound by law;
2. Equality before the law;
3. Law and order;
4. Predictable, efficient justice; and
5. Lack of state violation of human rights.³⁶

None of these ends are innovative in themselves, but are proposed to be universal, partly through their cultural generality and independence from internal merit-ranking, since they concern different cultural and political issues.³⁷ They reflect in much more specific terms the view of Waldron, who prefers to conceive of the rule of law as a “political ideal” constraining the exercise of political power to protect subjects and emphasising the importance of the “procedural and argumentative aspects of legal practice” in addition to predictable rules.³⁸ He also requires five characteristics of a system of law: courts, “general public norms,” “positivity,” “orientation to the public good,” and “systematicity” – granting a much greater level of values flexibility than Kleinfeld.³⁹ As will become apparent below, even Waldron’s view becomes normatively prescriptive when applied to an international structure.

³⁵Chesterman, above n7, at 333, references omitted. Therefore “substantive political outcomes – democracy, promoting certain human rights, redistributive justice or laissez-faire capitalism, and so on” are not necessary requirements of the rule of law.

³⁶Rachel Kleinfeld, ‘Competing Definitions of the Rule of Law,’ in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p31), pp36-46.

³⁷Ibid, p35.

³⁸Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1, at 5.

³⁹ Ibid, at 20 et seq.

Kleinfeld's theory maintains the two predominant features of the substantive view: it has the rule of law as an end state with identifiable institutional characteristics, and it includes normative content. Importantly Kleinfeld's view is based on the 'rule of law' in terms which focus on states, like the formal and substantive schools, whereas Chesterman is explicitly interested in the international rule of law.

Critics of all those who import normativity into the rule of law argue that:

If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. ... It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.⁴⁰

The same can be applied a fortiori to functional theories. Describing the rule of law as a situation in which the law, made by an agreed body, constrains officials and is general in its application merely restates the concept of authority, not the authority of law in society.⁴¹ This is a general handicap in rule of law thinking. For this reason, Nardin, objecting to normativity, distinguishes law and the rule of law; the latter is a "moral" concept in the sense of constraining governments and individuals. Failing to recognise this conflates "law as a constraint on the exercise of power [and] law as an instrument of power."⁴²

The attempt to prescribe a complete and unitary system of formal or public social ordering in the rule of law is flawed for further reasons. Firstly, not all aspirational values, such as economic or social rights, are capable of realisation through law, leading to confusion for a rule of law system that purports to include them. Lack of rules might actually be the only possible outcome.⁴³ Secondly, increased economic and social complexity and therefore the social goals required of government may require purposive interpretation of general rules, whose generality is no longer sufficient to achieve certainty and predictability.⁴⁴ Thirdly, the rule-

⁴⁰Raz, above n33, at 196. See also Chesterman, above n7, at 340-1.

⁴¹Nardin, above n10, at 392. See also Craig, above n11, at 478, discussing Dworkin's theory of law.

⁴²Nardin, above n10, at 385.

⁴³Summers, above n13, at 140-1.

⁴⁴Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, Free Press, New York, 1976.

maker in modern societies is not the sole, and perhaps not the main repository of authority, which also lies in the workplace and family. A commitment to formal equality under the rule of law cannot effectively alter this distribution of non-government power, because it assumes that government is the impersonal repository of authority.⁴⁵ Rather than simply being a case where society elects to sacrifice the formal rule of law for other social goals,⁴⁶ assuming that this is a valid path contrary to the assertion of rule of law thinking, the theory poses a fundamental challenge for an immutable and universal concept of the rule of law.

1.2 Deconstructing the Assumption of Cross-cultural Universality

‘Universality’ has two rule of law meanings: it is both a positive principle, demanding that laws apply to all (internal universality or generality of application), and a claim of systemic right or legitimacy because there can be only one ‘rule of law’ for all (external universality). The problem with nearly all theories of the rule of law is the necessary claim to the latter by mandating certain institutional forms and values.

The claim to universality has its origins in Continental justice theory that there was only one “Right,” in which individual choices were harmonised under a “universal law of freedom,” and that the purpose of law was to realise it.⁴⁷ That is, the singular Right was the rule of law.⁴⁸ For these theorists, Right is because it is, either in the state of nature or as a derivative of reason – it is identified not created.⁴⁹ On its face this sits easily with the substantive view of the rule of law. However, when it comes to defining the concrete features of ‘Right,’ in order to separate rule of law systems from other rules, difficulties are encountered because there is no

⁴⁵Ibid.

⁴⁶Craig, above n11, at 477; see also Summers, above n13, at 137. If domestic choices can be made about the relative merit of rule of law principles, then those principles must be advisory at best.

⁴⁷Immanuel Kant, *The Metaphysics of Morals*, 1785 (translated by Mary Gregor, Cambridge University Press, Cambridge, 1991), p56. Radbruch too places Right as the ideal goal of law: Gustav Radbruch, *Rechtsphilosophie*, 1932 (6th Edn, K.F. Koehler, Stuttgart, 1963).

⁴⁸Fletcher, above n20, p37.

⁴⁹Ibid, pp35-6.

universally recognised procedure for identification.⁵⁰ The very debate leads to violence and conflict.⁵¹

A comparison of cross-cultural theories of law and the rule of law reveal immediate differences in approach which challenge the claimed universality of Right. Historically, comparative legal study has not been a focus of legal theory, which has drawn largely on Western experience,⁵² so that the very idea of the ‘rule of law’ springing from ancient Greece is said to be ‘particular’ to the West.⁵³ It is true that non-Western theories do not tend to emphasise the *rule of law* but their theories of law itself demonstrate a divergent understanding of Right, and indeed whether Right is the purpose of law at all. It is also a fallacy to ascribe one theory of Right and the method by which the rule of law realises it to Western theorists.

1.2.1 *The Problem of Language*

The language of rule of law discourse demonstrates a strong preference for an Anglo-Saxon, common law tradition. Common law terms generally advanced as foundations of a rule of law system, in particular ‘due process,’ cannot be adequately rendered out of English.⁵⁴ No Anglophone culture has successfully adopted other than a common law system, and nor have non-English speaking countries successfully adopted it.⁵⁵ However, by contrast, the ability to translate German legal concepts into local languages has led to the adoption of continental civil law in a range of non-German speaking countries, including, Russia, Greece and Japan.⁵⁶ This begins to suggest a link between the institutional features of the traditional rule of law and the capacity to express them in the local language.

Fletcher argues that this is due in part to the peculiarity of the English language. Unusually, it allows the single word ‘law’ to represent both rules enacted

⁵⁰Stromseth et al, above n27, p71.

⁵¹Tolbert and Solomon, above n14, at 32.

⁵²Majid Khadduri, *The Islamic Law of Nations: Shaybānī's Siyar*, John Hopkins Press, Baltimore, 1966, p.xii.

⁵³Simsovic, above n8, at 767.

⁵⁴Indeed, there is a “strong affinity” between the broad concept of the common law and the English language: Fletcher, above n20, p5. Fletcher also locates institutional deference ‘peculiarly’ within common law Anglo-American legal systems, because of their “complex structures of power.” Continental legal systems struggle to make “an apt translation.” pp72-3.

⁵⁵Ibid, p5.

⁵⁶Ibid.

(‘law’) and a higher principle, which binding because of its inherent soundness (‘Right’). An essential example is the very phrase ‘rule of law.’⁵⁷ Using the single term leaves it open to overlapping formal and substantive interpretations. Continental languages, however, traditionally assign different words to each.⁵⁸ The latter meaning also captures in each non-English language individual rights, so that substantive appeals to human rights really call to Right above rules enacted.⁵⁹ Non-English language-based theory can better theorise the universality of Right, because it readily distinguishes it from rules laid down.⁶⁰ It is clear that the language used shapes the focus of rule of law thinking, and that this can easily vary on the global scale.

The shaping of legal theory by language controls the texture and complexity of law.⁶¹ It governs not only the terms of the rule of law, but the nature of the institutional forms which are popularly agreed as an essential characteristic of the rule of law - a strong and independent adjudicative process, taking the form of courts and a judiciary. However, if that is accepted as universal at least in the present world order, the function of courts and judiciaries remains contested across legal cultures. For example, in the Anglo-American common law culture, it centres on regulating the exercise of government authority, privileging judicial process and equalising standing before the law, and need not rely on a written constitution over case-by-case precedential development.⁶² Continental jurists are less interested in judicial process than the character of the state in determining social order, and therefore emphasise the development of a firm ‘basic law’ understood through doctrinal analysis.⁶³

⁵⁷Ibid, pp11-13.

⁵⁸Ibid, for example *Gesetz/Recht* (German), *loi/droit* (French), *zakon/pravo* (Russian), *ley/derecho* (Spanish). The same observation may be made about Arabic, geographically closest to the cradle of Western legal traditions, which distinguishes likewise between *qanūn* and *huqūq*, the latter of which derives from the root word for truth.

⁵⁹Ibid.

⁶⁰That is not to say that it necessarily always does - German Hans Kelsen’s positivism (formalism in another guise) happily conflates the two, accepting rules laid down as conclusive of Right: *A Pure Theory of Law*, 1934 (translated by Max Knight, University of California Press, Berkeley, 1967).

⁶¹Fletcher would not go so far, rejecting the proposition that “language dictates the horizon of thought” and accepting only that there is “some not-fully understood connection between language and legal thought,” so that concepts including the rule of law develop within the “linguistic terrain.” above n20, p12.

⁶²Chesterman, above n7, at 336, summarising A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1st Ed), 1885.

⁶³Chesterman, above n7, at 336-7.

1.2.2 *The Problem of Culture*

The conceptual flaw which demands the description of universal Right at a level of generality in which it has no content becomes more apparent when non-Western traditions are included. Where language challenges the universality of Right, cultural divergence shatters it completely. This is the result of the application of pure theory to legal context, a task which must be part of the rule of law thinking process.⁶⁴

Asian and Hebrew legal thinking and language posit law as a “path” to other values as opposed to the Western end-state view of Right as the description of a good legal system.⁶⁵ In the former, rather than human rights being seen as individual, the “commonality and cooperative nature of the legal experience” prefers the greatest community benefit rather than the Western competition of individual against individual for the maximisation of personal rights.⁶⁶

The primacy of the group in African as well as Asian and Hebrew legal discourse demonstrates fundamentally different concepts of Right between traditional rule of law theorists and the rest of the world community. Many non-Western cultures value group rights above the individual, and rights of group members over non-members, and identify the ‘group’ much more broadly than the Western nuclear family.⁶⁷ Cultural background may also affect one’s predilection for generality over particularity in law, challenging the assertion that generality is a precondition of the rule of law.⁶⁸ Tension can, of course, exist within cultures not just between them.⁶⁹

It could be suggested that non-Western theories which do not accept human rights as the underlying substance of the rule of law have been rendered obsolete by

⁶⁴Nardin, above n10, at 386.

⁶⁵Fletcher, above n20, pp38-9.

⁶⁶Ibid, pp38-40.

⁶⁷Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, Palgrave, New York, 2001, pp162-3 and the references he cites.

⁶⁸“Asians are more likely than Americans to take note of background and context, raising the question of whether Asians might thus incline to qualify ‘precedent’ more heavily and to view precedent as controlling or even apposite in fewer circumstances.” *ibid*, p171.

⁶⁹For example, the difference in ancient China between the Confucian view that society be organized around *li*, or rules of propriety, and the Legalist preference for *fa*, or rules imposing a threat of sanction. The dispute persisted from the eighth to the third century BC: Chesterman, above n7, at 338.

the embrace of human rights on a global scale. However, this would generalise the universality of rights to create cultural uniformity when in fact there is little. For example, States agree almost universally that there is a right to life, but, based on cultural determination of traits suitable for participation in civil society, do not necessarily accept that each life has an equal value.⁷⁰ The difference in values regarding retributive punishment and the lack of general acceptance of economic rights necessary to sustain life (a right to food, a right to medical care) or its quality (a right to education, a right to adequate housing) place the ‘right to life’ at different levels in different areas. Notwithstanding the Universal Declaration of Human Rights and subsequent rights treaties,⁷¹ Glennon is still disposed to speak of a “gap in fundamental values” for this single right.⁷² More broadly, feminist critiques of rights law point out that they do not address at all the “political, economic, social and cultural context in which most women live” as a result of the “various distinctions between public and private worlds” employed, questioning therefore whether there are any “general” human rights norms.⁷³ Indeed, the results of this lack of a shared understanding as to content of rights are “very broad ‘margins of appreciation’” in international debate about their implementation.⁷⁴

Finally, questioning the notion of universal rights in a globalised world, Kinley notes that a “focus on needs and capabilities exposes the reality that for the vast majority of the world’s population, favourable economic and social conditions are at least as important to the fulfilment of an individual’s capabilities as facilitative civil and political conditions,” which is the focus of well-accepted human rights through, for example, the ICCPR, and that it is “globalising economic forces” which are able to address them. The result, according to him, is potentially only a “limited

⁷⁰Glennon, above n67, p166.

⁷¹Article 3, *Universal Declaration of Human Rights 1948*, adopted by General Assembly Resolution 217 (1948), A/RES/217 A III; Article 6(1), *International Covenant on Civil and Political Rights*, adopted by General Assembly Resolution 2200 (1966), A/RES/2200A XXI, 999 UNTS 171, entered into force 23 March 1976 (“ICCPR”); Article 2(1), *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Council of Europe, 4 November 1950, Rome, 213 UNTS 221, entered into force 3 September 1953 (“ECHR”); and Article 4(1), *American Convention on Human Rights*, adopted by the Organization of American States, 2 November 1969, San José, 1144 UNTS 123, entered into force 18 July 1978 (also known as the *Pact of San José*) (“ACHR”), among others, which all employ the same undefined formulation of a right to life.

⁷²Glennon, above n67, at 166.

⁷³Hilary Charlesworth, ‘Whose Rule? Women and the international rule of law,’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p83), p86.

⁷⁴See further *ibid*, p89.

role for the rule of law” in globalising rights practice.⁷⁵ Kinley recognises the focus of that limited role as the provision of a “regulatory framework” only, since “‘legal rights and legal systems’ do little (though not nothing) to ensure anything like an equitable division of spoils as needs demand.”⁷⁶

Communities do not necessarily accept a need for the rule of law to be universal and general outside their own context. There is evidence to suggest that the opposite may be true. Communities may be happy with a rights-based definition of the rule of law that is universal but is sufficiently general to permit a local gloss. During the ultimately unsuccessful international intervention in Somalia in the 1990s, “the de facto clan division and the re-appearance of tribalism had the unforeseen advantage of establishing a sense of trust between the population in one particular area and the people who would later serve as judges and police, because they were all of the same clan or subclan.”⁷⁷ Taken at its highest, this local refusal to trust in or want total cultural independence and objectivity when constructing the ‘independent rule of law-based judiciary’ has significant implications for the nature of the rule of law as an end state the way it is traditionally conceived. Independence is a popular value only when it exists within a satisfactory cultural paradigm – independence from the cause is required, but not from society. For this reason, a project to develop a model transitional criminal code drawing on various legal systems for use in interventions⁷⁸ is unlikely to be any more successful at producing the rule of law than the importation of foreign laws wholesale.

The inclusion of religious courts, or personal status courts based on religious precepts, in various, predominantly Islamic, legal cultures, adds another dimension. They pose a challenge because they exist alongside laws of general application

⁷⁵David Kinley, ‘The Universalizing of Human Rights and Economic Globalization: What Roles for the Rule of Law?’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p96), pp106-7.

⁷⁶Ibid, p108, although Kinley notes that many economic and social rights are non-binding are not yet in force.

⁷⁷Martin P. Ganzglass, ‘Afterword: Rebuilding the Rule of Law in the Horn of Africa,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p340), p342. Ganzglass noted a similar phenomenon in the early days of the Kosovo intervention, pp348-9.

⁷⁸Project being undertaken by the University of Galway and the United States Institute of Peace, see Tolbert and Solomon, above n14, at 43; Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations, A/55/305 S/2000/809*, United Nations, 2000, (“Brahimi Report”), para 83.

which apply universally to the community and its officials, but permit religious determination of certain areas of law according to the specific legal religion of the individual – that is, rather than having universal determination of personal status before general courts, personal status is decided by the ecclesiastical tribunals of the individual’s religion.⁷⁹ Tribal custom, more broadly, might also be envisaged as applying separately to different groups in multi-tribal states, but through national law.⁸⁰ Is this an impermissible lack of universality, contrary to the rule of law? Not if Right as the substance of the rule of law is accepted as universal only when it is vague enough to permit culturally specific institutions and participation.⁸¹

Islamic law poses particular problems for the acultural, universal rule of law advocated by formalists and substantivists alike, but they are not irreconcilable. Formalists do not demand that procedures to identify rules take any particular form and can accommodate revealed law. In fact, revealed law has a natural consonance with the tenets of rule of law theory: since the source of authority of law is above challenge by any in society, including officials, it naturally embraces “a notion of supremacy of law – application of law to the ruler as well as to the ruled, and the independent interpretation of law by scholars.”⁸² Historically, then, Islam demonstrated a core feature of the rule of law before the emergence of the debate in European theory, even though the “term ‘rule of law’ does not translate directly into modern Arabic.”⁸³

⁷⁹Personal status courts according to religious law, which includes differing rules between sects, for example Sunni and Shi’ite Islam, are provided for constitutionally in Iraq: Article 39, *Permanent Constitution of the Republic of Iraq*. Other countries use statutory arrangements, including Lebanon and Egypt, in the judicial regulation of marriage, divorce and inheritance between monotheistic religious groups: see further Sherifa Zuhur, ‘Empowering Women or Dislodging Sectarianism?: Civil Marriage in Lebanon’ (2002) 14 *Yale J L & Feminism* 177. India, Israel and Malaysia also preserve personal status for religious determination: see Josh Goodman, ‘Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel’ (2009) 32 *Hastings Int’l & Comp L Rev* 477.

⁸⁰South Africa allows the application of tribal “customary law,” where not contrary to constitutional and statutory rights: section 211, *Constitution of South Africa*.

⁸¹Kant, however, considered that until differences in religion and language were overcome, no more than a superficial mingling of ideas was possible, and therefore “a genuine coming together of fundamental values held by the mass of humanity ... was years away,” and “supranational organization [was] unattainable.” Glennon, above n67, p164, discussing Immanuel Kant, *Perpetual Peace*, 1795 (translated M. Campbell Smith, Allen and Unwin, London, 1903), p259.

⁸²Chesterman, above n7, at 339.

⁸³It is rendered as *siyadat al-qanun*, which literally translated means ‘sovereignty of law,’ a concept closer to rule by law: Chesterman, above n7, at 339-40.

1.2.3 *The Blueprint Analysis of the Rule of Law*

The result of a cross-cultural analysis of the universality of the rule of law whether as a procedural or a substantive result is the recognition that it is a “culturally situated idea.”⁸⁴ It must follow that the cultural situation of the rule of law is able to accommodate institutional differences (as it in fact does, even within Western experience). Instead a group of theorists, many of whom have practical experience in interventions, insist that there is a “‘blueprint’ for building the rule of law in post-intervention societies, addressing institutional forms of the constitution, of courts, police, legislatures and bar associations. The centrality of these institutions to a ‘fair trial,’ and therefore, it is said, the rule of law in a free, rights-based society has been repetitively declared in international fora, to the extent that “the expansion and fulfilment” of the rule of law is described as the “primary” responsibility of jurists.⁸⁵

The existence of these forms and a “normative cultural commitment” to them must produce the rule of law, it is claimed, although the argument that there be cultural commitment is usually defined absolutely as an acceptance of a prescriptive list of human-rights based normative values and liberal democratic institutions.⁸⁶ Despite the attempt to locate it in differing cultural landscapes, it appears that this “rule of law” can only exist in liberal democratic (and thus largely Western) monocultures. Many “paths” might be recognised but only if all lead to the “same bottom line.”⁸⁷ Therefore cultural accommodation is limited to the means by which a community can reach the rule of law ideal, which is singular and universal. It remains to be seen whether there is in truth any actual scope for cultural divergence to reach the same result.

⁸⁴Stromseth et al, above n27, p11. See also Fletcher, above n20, p35.

⁸⁵*Declaration of Delhi*, International Congress of Jurists, 10 January 1959, ‘reaffirming’ the International Congress of Jurists, *Act of Athens* 18 June 1955, convened at the invitation of the International Commission of Jurists. However, the *Congressional Report of Committee 1*, New Delhi, 5-10 January 1959 also saw this as the responsibility of the legislature. The documents are reproduced in Norman S. Marsh (Ed), *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India, 1959*, International Commission of Jurists, Geneva, 1959.

⁸⁶For example, Stromseth et al, above n27, p11.

⁸⁷John Norton Moore, ‘Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance’ (1997) 37 *Virg J Int’l L* 811, at 860. Stromseth et al are critical of the “lip service” paid even to this approach by rule of law program “decision-makers” in the field: above n27, p75 (FN56).

The problem of universality has led at least one writer to assert that “a definition that is applicable and acceptable across cultures and political systems will necessarily be a formal one.”⁸⁸ Even that is not supportable, however, given the core institutionalism with which formalism has been endowed. All that can be concluded is that it is fundamentally inconsistent and flawed to conceive of the rule of law as a universal end-state of Right. Instead, it indicates that the universality and the good is in the process, or the relationship, of a community to law and not the result.

The blueprint analysis originates with rule of law practitioners, who seek to create it in troubled societies, particularly those in which armed intervention occurs with the creation of the rule of law as one of its missions.⁸⁹ Given that extant human rights law provides for derogation, particularly affecting judicial institutions identified as core rule of law requirements, in times of national emergency,⁹⁰ it is necessary to consider blueprint interventions and rule of law theory against that landscape as well as the ideal rule of law.

1.3 States of Emergency and Rights-Based Rule of Law Institutions

The permissibility of derogating from individual human rights in response to national emergencies has been described as “the cornerstone” of the rights system.⁹¹ It allows measures otherwise not permitted to restore order in “time of public emergency which threatens the life of the nation,” provided the emergency is “officially proclaimed”⁹² and exceptional.⁹³ ‘Order’ in this context represents “the

⁸⁸Chesterman, above n7, at 342.

⁸⁹Including Stromseth et al, above n27; Kleinfeld, above n36.

⁹⁰Article 4, ICCPR, for example.

⁹¹Jaime Oraá, ‘The Protection of Human Rights in Emergency Situations under Customary International Law’ in Guy Goodwin-Gill and Stefan Talmon (Eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999 (p413), p413. The principle of derogation in emergency is repeated in Article 4, ICCPR; Article 15, ECHR; and Article 27, ACHR. Oraá considers it to be of “general acceptance” in international law, as custom (p414). See also the Explanatory Paper prepared by Mr L. Despouy (Argentina), Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1985/19 (17 Jun 1985) (“Despouy Report”).

⁹²Article 4, ICCPR. The *Minimum Standards of Human Rights Norms in a State of Emergency* adopted by the International Law Association at their 61st Conference (Paris, 26 Aug – 1 Sep 1984), (“*Paris Minimum Standards*”), employ the same language in section A1(a), although it elaborated further in (b) that “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.” The *Paris*

sum of rules which ensures the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order.”⁹⁴

The cause of the threat can be manifold. Although war is not referred to specifically – because the drafters were concerned about consistency with the object of the United Nations in preventing war⁹⁵ - this “most vivid paradigm of a threat to the life of a nation” is included.⁹⁶ It has also been applied to internal disturbances, on a test of whether the ordinary functioning of the criminal justice system is “rendered wholly impossible,”⁹⁷ and to revolutions resulting in a fundamental change of national character.⁹⁸ *Force majeure* was also in the mind of the drafters, but not circumstances of economic underdevelopment, which were subject to separate study by the United Nations.⁹⁹

Although derogation from fundamental rights is permitted in these circumstances, procedural safeguards are applied, including temporal restrictions,¹⁰⁰ certain criteria-based controls and the prohibition on changes to the “bases of institutions” (as opposed to temporary modification of functions) to allow simple reversion when the emergency is resolved.¹⁰¹ The criteria associated with control are: public notification of the emergency and measures, proportionality to the actual

Minimum Standards are reproduced in Subrata Roy Chowdhury, *Rule of Law in a State of Emergency*, Pinter Publishers, London, 1989.

⁹³Section A(1)(b), *Paris Minimum Standards*.

⁹⁴Principle 22, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984) (“*Siracusa Principles*”), defining ‘public order’ in the ICCPR.

⁹⁵*Travaux préparatoires* to Article 4, ICCPR: 10 GAOR Annexes, UN Doc A/2929, para 39 (1955).

⁹⁶Chowdhury, above n92, p23, and see Oraá, above n91, p416. The *Siracusa Principles* seem to place internal conflict in a complex definition of “national security,” which demands a threat of force to “the existence of the nation or its territorial integrity or political independence,” but not “merely local or relatively isolated threats to law and order.” Principles 29 and 30.

⁹⁷*Lawless v Ireland* (Application Nr 332/57) Pub EUR Court of HR, Series B (1960-1), at 82-3.

⁹⁸The *Greek Case* (1969) 12 *Yearbook of the European Convention on Human Rights* 1; see Chowdhury, above n92, p39.

⁹⁹This and armed conflict are discussed in the *travaux préparatoires* to Article 4: N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency*, UN Doc E/CN 4/Sub 2/1982/15, 27 July 1982 (“Questiaux Study”), paras 25-6; Chowdhury, above n92, p15. Chowdhury considers that rights restrictions for economic or social development “might well be covered by limitations clauses permissible in normal times by the express terms of the ICCPR and need not at all” necessarily rely on derogation under Article 4. He is critical of underdevelopment as a “pretext” for derogation, given empirical evidence of the failure of derogation in emergencies to result in economic development: pp19-21 and the references he cites.

¹⁰⁰Section A(1)(3b), *Paris Minimum Standards*.

¹⁰¹Questiaux Study, above n99, paras 86-8.

situation, non-discriminatory application and consistency with other obligations under international law.¹⁰² Finally, measures must not derogate from the small number of rights identified as non-derogable in any circumstances.¹⁰³

Oversight of emergency measures is less comprehensive and responsibility has been attributed to the legislature to maintain the rule of law,¹⁰⁴ or to the courts through judicial review or to another “national monitoring mechanism.”¹⁰⁵ However, the unwillingness of common law courts, for example, to engage in robust review of derogation measures, where bad faith on the part of the executive cannot be demonstrated, means Alexander recommends that they “ideally should not be involved.”¹⁰⁶ He concludes that courts have an important role only against threats less than armed conflict, in which they “should insist on the Rule of Law and resist the temptation to embellish legislative proscriptions.”¹⁰⁷ Further, where the country is in an institutional “state of flux,” Lalive at least recognises that a “Western pattern of checks and balances” between legislature, executive and judiciary, on which this kind of review depends, may not be possible. He considers that that does “not per se affect the operation of the Rule of Law,” which rather depends on the relative interest of the citizen and national security.¹⁰⁸

The dominant view is that protection of human rights as presently identified represents that balance. Interestingly, the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

¹⁰²Despouy Report, above n91, UN Doc E/CN.4/Sub.2/1989/30/Add.2/Rev.1, paragraph 2; *Paris Minimum Standards*, Section B: Emergency Powers and the Protection of Individuals. *Siracusa Principle 51* takes a slightly narrower focus, emphasising limitations of severity (control), duration and geographic scope as a means of assessing reasonableness of emergency measures. Principle 66 reasserts the applicability of obligations such as under Geneva Conventions: see further Chowdhury, above n92, p103; Oraá, above n91, p424.

¹⁰³Oraá, above n91, p417. These principles have been applied as custom by the Inter-American Commission on Human Rights, for example in *Report on Paraguay*, 1987 (Paraguay had not ratified the convention), 16; *Report on Chile 1974*, leading Meron to consider it a regional custom: Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, Oxford, 1989, p219 (FN262). Oraá makes clear the importance of custom in this field given that a third of states are not parties to the major rights treaties which provide for emergency derogation: p412.

¹⁰⁴Chowdhury, above n92, p55.

¹⁰⁵Despouy Report, above n91, UN Doc E/CN.4/Sub.2/1989/30/Add.2/Rev.1, paragraphs 2-3; Oraá, above n91, p424. This is consistent with *Siracusa Principle 24*, that public order agencies be under judicial or legislative control, or that of “other competent independent bodies.”

¹⁰⁶George Alexander, ‘The Illusory Protection of Human Rights by National Courts during Periods of Emergency’ (1984) 5 *Human Rights Journal* 1, at 1. See also Chowdhury, above n90, p59.

¹⁰⁷Alexander, *ibid*, at 64; Chowdhury, *ibid*.

¹⁰⁸Jean-Flavien Lalive, ‘Introduction,’ Marsh (Ed), above n85, pp.xii-xiii.

(Siracusa Principles) require review to allow “challenge to and remedy against ... abusive application” of emergency measures,¹⁰⁹ notwithstanding that the very departure from rights standards is said by rule of law theorists, especially blueprint theorists, to be abusive. For non-derogable rights, their special character means that judicial review cannot be ousted, which is said to mean that even in emergencies “the rule of law shall still prevail.”¹¹⁰

This is a troubling aspect. If democratic rights protection through certain institutional forms represents the rule of law, as is claimed, then both derogation of rights and the necessity of government “in a sense by decree”¹¹¹ in emergency situations must amount to a derogation from the rule of law. However, extant and accepted legal practice attempts to cloak rights derogation in rule of law forms through review and thus an implied principle of legality, in which emergency measures are authorised by law and otherwise meet legal requirements of certainty and generality of application.¹¹² This is at the expense of conceptual clarity. The Siracusa Principles, for example, explicitly acknowledge that rights violations “[undermine] true national security” and therefore security purposes cannot justify “measures aimed at suppressing opposition to such violation” or repression of the population.¹¹³

However, practitioner theorists such as Stromseth and the ‘blueprint’ school overcome this difficulty in the only conceivable way – when advocating rule of law interventions, they advocate efforts directed to the rule of law in ordinary situations, to procure a return to order and security which they see as coterminous with the rule of law. They do not advocate the deliberate usage by interveners of emergency measures in derogation of fundamental rights standards. The focus is illustrated clearly in the case of the right to a fair trial.

¹⁰⁹*Siracusa Principle* 8.

¹¹⁰*Siracusa Principles* 60 and 64.

¹¹¹Issue introduced by Judge Harold E. Stevens, United States, at the International Congress of Jurists, Debate on Tuesday 6 Jan 1959, 1500-1730; see further Marsh (Ed), above n85, p67.

¹¹²*Siracusa Principles* 15-17.

¹¹³*Siracusa Principle* 32.

1.3.1 Non-Derogability and the Right to a Fair Trial

Although human rights instruments generally self-define ‘non-derogable rights’ within their own field of operation, there are only four human rights commonly considered non-derogable as *ius cogens* norms: the right to life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, and the principle of non-retroactivity of criminal laws.¹¹⁴ Oraá objects to this minimalist approach to non-derogability, arguing that, inter alia, it excludes “some fundamental rights which are indispensable for the protection of human beings and very much at risk in emergencies, such as some minimum guarantees against arbitrary detention and concerning fair trial.”¹¹⁵

However, while the eight non-derogable rights in the ICCPR touch on aspects of criminal justice,¹¹⁶ rights to liberty and security of the person, including freedom from “arbitrary arrest or detention” and procedural safeguards in case of arrest or detention are *not* identified in Article 4, ICCPR, as non-derogable rights.¹¹⁷ Above all, none of the provisions in Article 14 regarding a “fair and public hearing by a

¹¹⁴As to customary law, see Oraá, above n91, p433; as to treaty law see Jaime Oraá, *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992, p96, citing the ICCPR, ECHR and IACHR. *Siracusa Principle* 69 adds freedom from “medical or scientific experimentation.” Other areas, such as the Organisation for Security and Co-operation in Europe include other rights, such as freedoms of expression and communication: Copenhagen Document (1990), para 25 ((1990) 29 ILM 1305), Moscow Document (1991) paras 28.1-10, reprinted in (1991) 30 ILM 1683. Meron notes that there is “no immediate prospect of consensus” beyond this minimal list of four: ‘On a Hierarchy of International Human Rights’ (1986) 80 *AJIL* 1, at 16. However, there is clearly a penumbra of uncertainty regarding interpretation here. For example, the American Law Institute posits that “prolonged arbitrary detention” would also be “against *ius cogens* norms; however, if the conditions of the derogation clause are met in a state of emergency, the detention would presumably not be arbitrary.” American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, St Paul, Minnesota, 1987, p174-5.

¹¹⁵Oraá, above n91, p434. He is also critical of the inclusion of some “not so indispensable” rights as non-derogable in the ICCPR and ECHR.

¹¹⁶Including procedural rights in case of the death penalty (Article 6(4)), freedom from imprisonment as a debtor (Article 11) and recognition as a legal person (Article 16). There is effectively a ninth non-derogable right in the prohibition on derogating from other rights in a manner which is discriminatory for prohibited reasons, including race or gender (Article 4). Since procedural non-discrimination between prosecutor and accused in criminal trials (*égalité des armes*) is said to be the first principle of a fair trial (*Pataki v Austria*; *Dunshrin v Austria* Application Nrs 596/59 and 789/60, (1963) YB ECHR 714), there is undoubtedly some overlap in protection: Chowdhury, above n92, p213. Similarly, freedom from torture overlaps with the procedural right to freedom from self-incrimination, because it prohibits the gaining of evidence through compulsion. Chowdhury considers this important in a state of emergency, in which it is often abused: *ibid*, p217.

¹¹⁷Articles 9-10. Nor are restrictions to freedom of movement, when authorised by law and directed to “national security [and] public order,” inter alia, or expulsion of aliens without review or appeal: Articles 12-13. Further, the question of derogability on freedom from arbitrary detention does not preclude administrative detention in situations of emergency, as was upheld, for example in *Liversidge v Anderson* [1942] AC 206.

competent, independent and impartial tribunal established by law,” which even in a stable democratic society may be modified in the interests of “national security” or “public order,”¹¹⁸ are non-derogable in emergencies.

The European *Convention on the Protection of Human Rights and Fundamental Freedoms 1950* (ECHR) also permits derogation of rights to a fair trial and to liberty,¹¹⁹ justified on grounds that the “acts of violence which cause a public emergency, menace the personal security of other members of the community,” and temporary suspension, as authorised by many Continental constitutions, was permitted to restore security for all.¹²⁰ The Siracusa Principles specifically refer to “national security” and “public order,” as well as non-emergency reasons for derogation, including preserving the “fairness of the trial,” as reasons to derogate from the right to a public trial.¹²¹

The ILA Conference of 1984 took a markedly different approach when it established the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, identifying sixteen rights as non-derogable, including the right to a fair trial and the right to remedy.¹²² The previous year, the International Commission of Jurists recommended that “all the due process rights should remain non-derogable, except three types of measures: suspension of the right to a public trial; permitting larger delay than normal in proceeding to trial,” and some procedures relating to admission of testimony from witnesses not appearing at trial.¹²³ Although consistent

¹¹⁸Article 14(1), similarly the presumption of innocence (14(2)), procedural equality including avoidance of “undue delay” (3), review on appeal (5) and protection from double jeopardy (7), ICCPR. This is demonstrated by the UN Special Rapporteur on extra-judicial, summary or arbitrary executions, who described how near permanent states of emergency in states such as Egypt resulted in the suspension of fair trial standards by military courts trying civilians, contrary to the ICCPR, including the lack of judicial independence and a right of appeal. The criticism was in the characterisation of the underlying national situation as an emergency. See Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions*, Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1997/61, Addendum: Country Situation, UN Doc.E/CN.4/1998/68/Add.1, 19 December 1997, paras 152-3.

¹¹⁹Articles 5, 6 and 15, ECHR.

¹²⁰*Lawless v Ireland*, above n95, at 125 per Professor Waldock.

¹²¹*Siracusa Principle 36*.

¹²²Articles 1-16, in which Article 7 refers to a right to a fair trial and Article 16 to a right to remedy. The *Siracusa Principles* also establish not only a non-derogable right to a fair trial and freedom from arbitrary detention but identify complex minimum standards amounting to it: Principle 70.

¹²³International Commission of Jurists, *States of Emergency: Their Impact on Human Rights*, Geneva, 1983, p429; see also Chowdhury, above n92, p212. Chowdhury differed, however, with the Commission and with the *Paris Minimum Standards* on the derogability of unreasonable delay in trial,

with blueprint rule of law, these documents have not in the previous 25 years crystallised into a new rule of custom establishing a non-derogable right to a fair trial in emergencies less than armed conflict.

However, where the national emergency amounts to an armed conflict attracting the protections offered by the Geneva Conventions, common Article 3(1)(d) prohibits sentencing “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹²⁴ It has been argued that if these protections are indispensable in time of war, they must “*a fortiori* be considered non-derogable in times of lesser threat.”¹²⁵ Chowdhury brings what he argues are non-derogable aspects of fair trials rights, which could never “be justified on the principle of strict necessity,” under the aegis of common Article 3 “indispensable judicial guarantees.”¹²⁶

Common Article 3 has been subject to recent analysis as a result of the so-called war on terror and US detention practices at Guantanamo Bay, Cuba. Rejecting the form of military commissions established by executive decree, the US Supreme Court said of these indispensable guarantees:

Like the phrase “regularly constituted court,” this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law ... [The] procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any “evident practical need,” and for that reason, at least, fail to afford the requisite guarantees. We add only that, as noted in Part VI–A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.¹²⁷

considering that “it is implicit in the concept of the fair trial that there should not be any unreasonable delay,” although he would allow some delay in case of national emergency: p215.

¹²⁴For example, *Convention IV Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Geneva, 75 UNTS 287, entered into force 21 October 1950.

¹²⁵Dr Jimenez Arechega (former president of the ICJ), *Final Recapitulation, Inter-American Seminar on State Security, Human Rights and Humanitarian Law*, Inter-American Institute of Human Rights, San Jose, 1982; Chowdhury, above n92, p211.

¹²⁶Chowdhury, *ibid*, p210. He would also include them under “other obligations under international law” in Article 4, ICCPR, but, as discussed above, the general recognition of non-derogable rights in customary law is limited and does not expressly include fair trial rights.

¹²⁷*Hamdan v Rumsfeld* 548 US Rep 1 (2006), at 70-1 per Stevens J, for the Court, noting that the requirements of common Article 3 are “are general, crafted to accommodate a wide variety of legal systems.”

The Human Rights Commission considered that derogation from “normal” Article 14, ICCPR, protections should be “strictly” proportional,¹²⁸ clearly suggesting the legitimacy of derogation *per se* in circumstances not attracting higher protection under common Article 3. This is the heart of the issue – applying fair trial rights instruments as indicative of international agreement on the ‘indispensability’ of judicial guarantees in customary law must result in a minimum set of non-derogable standards. Suggesting they are something more, and should therefore apply *a fortiori* in peacetime, is circular because their indispensability in civilised nations at peace is what gives such guarantees meaning under common Article 3(1)(d). However, the minimum standards the US Supreme Court has identified, drawing on Article 75 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977*,¹²⁹ and labelled as customary law, are remarkably similar to derogable Article 14 procedural protections.

¹²⁸Human Rights Committee, *General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), paragraph 4. But compare Human Rights Committee, *General Comment Number 29: States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Ass.11, 31 August 2001, where the Committee concluded that “as certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected:” para 16.

¹²⁹8 June 1977, Geneva, 1125 UNTS 3, entered into force 7 December 1978. Article 75(4) in particular provides that “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt; (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

Notwithstanding, the suggestion that the Supreme Court may have been willing to entertain divergence from their minimum trial standards, if justified by “practical need,” presumably security, or legislative sanction, leaves little genuine difference between the Human Rights Committee’s view of Article 14 as derogable in emergencies less than an international armed conflict and common Article 3(1)(d) “indispensable judicial guarantees.” Significantly, Justice Stevens for the US Supreme Court reminded the executive that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”¹³⁰

It has been suggested “in circumstances of extreme political, economic and social upheaval the contingencies of the rule of law may be of a different order.”¹³¹ The tension, as Teitel phrases it, is between the rule of law “as backward looking and forward looking, as settled versus dynamic ... it serves merely to mediate the normative shifts in justice that characterise these extraordinary periods.”¹³² Kinley goes further, to argue that even in societies *not* in “hypertransition ... the rule of law is nevertheless always contingent on political circumstances,” describing it as a question only of “degree.”¹³³ This is not the rule of law as popularly advocated, although it better accommodates the tensions arising in states of emergency. The desire for “tools” to reform domestic organisation towards “democracy and respect for the rule of law and human rights, as well as effective management of resources” stems particularly from the series of atrocities in Rwanda, the Balkans and elsewhere late in the twentieth century.¹³⁴

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.”

¹³⁰*Hamdan v Rumsfeld*, above n127, at 72.

¹³¹Kinley, above n75, pp108-9.

¹³²Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ (1997) 106 *Yale LJ* 2011, at 2016.

¹³³Kinley above n75, pp108-9.

¹³⁴For example, Pirrko Kourula, ‘Governance and Coordination in Conflict and Post-Conflict Situations’ in Guy Goodwin-Gill and Stefan Talmon (Eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999 (p351), p352.

1.4 The Rule of Law as a Means to Separate Goods: Other Theories

Democracy and economic development are chief among the social goods postulated as flowing from the existence of the rule of law, including legitimacy, which give it purpose.¹³⁵ These multi-disciplinary theories view the rule of law as a set of norms whose observation and institutional forms lead to other, identified goods.

1.4.1 Rule of Law and Democracy

Removing the rule of law from the realm of pure law theory puts in contention the relative role of the rule of law and the state. Traditional Continental thinking was preoccupied with the *Rechtsstaat* or *État de droit*: a state in which law was the supreme authority. The legitimacy of law, and therefore the state, derived from reason “as well as the formal requirements of legality.”¹³⁶ Rousseau in particular argued that law was supreme, but only as the formulation of the popular will.¹³⁷ This is a manifestly substantive rule of law theory, with a democratic state based on reason as a necessary co-efficient.

Modern rule of law interventions are founded on the precept that democracy cannot exist without the rule of law, which is capable of measurement by its institutions. Once a critical mass of blueprint rule of law institutions is established, a stable democratic state is supposedly the result.¹³⁸ This result means no other form of state is capable of expressing the rule of law. Socialism, for example, because it places the state in a surrogate role to the citizen and not as a “disinterested arbiter,”

¹³⁵Chesterman, above n7, at 341-2. For example, development theory has ‘thickened’ the meaning of the rule of law by elaborating substantive goods: Thomas C. Heller, ‘An Immodest Postscript,’ in Erik G. Jensen and Thomas C. Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p382), pp382-3.

¹³⁶Chesterman, above n7, at 337 and the references he cites.

¹³⁷Jean-Jacques Rousseau, *The Social Contract*, 1762 (translated by Maurice Cranston, Penguin, London, 1968); although the formalist Raz considered it well possible that democracy could produce a legal system that did not accord with the rule of law: above n15, see further discussion in Craig, above n11 at 469.

¹³⁸Stromseth and her colleagues review a series of interventions, armed and aid-based, in the 1990s which attempted to “rebuild shattered societies broken apart by civil wars and ethnic conflicts. Crises in Bosnia, Rwanda, Kosovo, East Timor, and Sierra Leone led to rule of law efforts designed to rebuild (or at times build up from scratch) legal institutions, restore functioning governments, provide accountability for abuses and war crimes, and permit gradual economic recovery.” The concrete outcomes sought were the fostering of the rule of law and of democracy, through “the rewriting of constitutions and key legislation, support to law enforcement and the courts, and the provision of other forms of structural and technical assistance.” Stromseth et al, above n27, p62.

unable to produce disinterested and consistent results, cannot produce a rule of law state.¹³⁹

Law and democracy allows us to conceive of the rule of law as something wider than the legal system, emphasising not 'law' in the 'rule of law,' but 'rule.' It demands democratic, reason-based governance and it draws on certain empirical facts discovered about democratic systems: democracies "rarely, if ever, wage war against one another."¹⁴⁰ It has now moved from academic debate to US foreign policy: it has been argued that 'democracy enlargement' became "the central intellectual theme of the Clinton administration."¹⁴¹

However, a blueprint analysis founded on a judiciary independent from the legislature and executive, procedurally protecting rights, cannot successfully lead to democracy, in that governments in both democratic and authoritarian states are capable of, and demonstrate, judicial independence; independence alone cannot "produce effective checks on power."¹⁴² In fact, courts in democratic as well as authoritarian regimes are "making decisions that were previously reserved for majoritarian institutions."¹⁴³

In a feature regularly observable in states of emergency and in authoritarian regimes, the fragmentation of the judiciary into regular and exceptional courts often actually reflects an increasing degree of independence in the regular courts, so that the greater autonomy of a court in an authoritarian state, "the greater the likely

¹³⁹Discussing a case study of the Budapest taxi drivers strike and the government response in 1990: Fletcher, above n20, p17.

¹⁴⁰The so-called "democratic peace phenomenon:" Norton Moore, above n87, at 822-3, who cites the independently empirical works of Bruce Russett, *Grasping the Democratic Peace: Principles for a Cold War World* (1993); Spencer Weart, *Peace Among Democratic and Oligarchic Republics* (1994); James Lee Ray, *Democracy and International Conflict: An Evaluation of the Democratic Peace Proposition* (1994; unpublished); Rudolph Rummel, *Power Kills, Absolute Power Kills Absolutely* (1991; unpublished); Spencer Weart, *Never at War: Why Democracies Will Not Fight One Another* (1994; unpublished). Norton Moore notes at his FN16 that with two exceptions, "the work of all these scholars was partly supported by the US Institute of Peace."

¹⁴¹Norton Moore, *ibid*, at 825.

¹⁴²Ginsburg and Moustafa (Eds), above n11, p16. At p1 (FN1), they acknowledge the contradiction between this criticism and the equally popular view that "judicial policy-making is antidemocratic." It follows, as case studies in their volume indicate, that formal independence as the rule of law cannot "ensure substantive notions of political liberalism," for example in Lisa Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' (p102) and Gordon Silverstein, 'Singapore: The Exception that Proves Rules Matter' (p73).

¹⁴³They consider that in modern undemocratic states across the world, courts have an "increasingly prominent role" both in advancing regime interests and crystallising opposition: Ginsburg and Moustafa (Eds), *ibid*, p2.

degree of judicial fragmentation in the judicial system as a whole,” with a moving delineation between the two “according to political context.”¹⁴⁴ Secondly, emphasising institutional independence overlooks the possible constraint of the judiciary through jurisdictional structure, the scope of review and standing, imposed by the rule-maker,¹⁴⁵ and the “characteristic weakness of civil society” in authoritarian regimes as a result of extralegal coercion and illiberal legislation.¹⁴⁶

While democratic peace provides a basis for popular rule of law legitimacy, it overlooks the employment of rule of law rhetoric in other contexts to other ends, which have little to do with democracy at all. Part of ‘legitimacy’ is seen as the presence of independent judicial institutions.¹⁴⁷ The appeal to ‘pure’ rather than emergency rule of law institutions is the quest for legitimacy, either as internal social acceptability among the subject population, or external acceptance as a participant in the international community on the same international rule of law footing.¹⁴⁸

This is apparent in peaceful, but authoritarian, regimes such as China, which has made the concept a “central component of its legitimation strategy,”¹⁴⁹ and in interventions in emergency situations.¹⁵⁰ It is of no matter that ‘legitimacy’ especially in the former may often be of use only to “economise on the use of force that is also a component of maintaining power.”¹⁵¹ Rule of law legitimacy was also employed in the penal colony of New South Wales in the eighteenth and nineteenth

¹⁴⁴Ginsburg and Moustafa (Eds), *ibid*, p18. In authoritarian states, they identify five particularly curial functions: “(1) establish social control and sideline political opponents, (2) bolster a regime’s claim to ‘legal’ legitimacy, (3) strengthen administrative compliance within the state’s own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime: p4.

¹⁴⁵*Ibid*, p19, footnotes omitted.

¹⁴⁶*Ibid*, p20.

¹⁴⁷*Ibid*, p5, arguing that courts may be used to “give the image, if not the full effect, of constraints on arbitrary rule.”

¹⁴⁸For example, Ginsburg and Moustafa argue that the central role of the modernisation of Japan’s legal order in the late nineteenth century, in face of “the threat of Western colonialism ... provided a sort of formal legitimacy to demonstrate to other nation states that Japan was a member of the club of modernity,” although as a form of internal “social ordering” it was much less important: *ibid*, p6.

¹⁴⁹*Ibid*, p3, citing the article in their edition by Pierre Landry, ‘The Institutional Diffusion of Courts in China: Evidence from Survey Data’ (p207). Landry himself demonstrates the significance of politics, including part membership, to practice in public institutions: for example, p209.

¹⁵⁰The ‘rule of law’ has been seized upon in international discussions about both unilateral and multilateral interventions in Palestinian occupied territories, Iraq, East Timor, Kosovo and Afghanistan, among others: see further, Jeremy Matam Farrall, *United Nations Peacekeeping and the Rule of Law*, Issues Paper No 1, Australian National University Centre for International Governance and Justice, March 2007, especially pp4-5.

¹⁵¹Ginsburg and Moustafa (Eds), *ibid*, above n11, p5.

centuries to settle the independent social order and balance of power between convicts, emancipated convicts and their supporters, and free settlers,¹⁵² notwithstanding that democracy and individual rights were not the organisation sought, and to establish a form of independence from Britain.¹⁵³

In several African states, Mexico and post-Nasser Egypt, authoritarian regimes provided access to courts “to better institutionalise rule and to strengthen discipline within their states’ burgeoning administrative hierarchies,” including against corruption,¹⁵⁴ or in Turkey and Iran as a means of social control.¹⁵⁵ In other areas – and including democracies – the use of courts to make significant decisions is seen as strategic “delegation by office holders and strategic compliance by judges (with somewhat similar policy preferences) who are better insulated from the political repercussions of controversial rulings.”¹⁵⁶

Importantly for the liberal-democratic rule of law in the international system, empirical analysis shows “no necessary connection between the empowerment of the courts and the ultimate liberalisation of the political system,”¹⁵⁷ while some analysts have noted a greater move towards rule of law rhetoric by regimes whose primary, substantive legitimising rhetoric, whether independence, wealth redistribution or other, has failed.¹⁵⁸ The effect of the rule of law institutional blueprint often has little to do with the ulterior purpose of the quest for legitimacy, questioning theories such as law and democracy or law and economics.

¹⁵²Neal, above n21, p62 et seq. Significantly, ‘rule of law’ was used not in terms of individual rights or liberties, which were well-known from contemporaneous revolutionary movements in other regions, but in reliance “on their British birthrights:” p25.

¹⁵³Ibid, p23.

¹⁵⁴Ginsburg and Moustafa (Eds), above n11, pp7-8, discussing the chapters of Jennifer Widner with Daniel Scher, ‘Building Judicial Independence in Semi-Democratic Uganda and Zimbabwe’ (p235); Beatriz Magaloni, ‘Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico’ (p180); and Tamir Moustafa, ‘Law and Resistance in Authoritarian States: The Judicialisation of Politics in Egypt’ (p132). Chesterman also notes this as a consequence of intervention, in which interveners believe they are advancing rights and democracy, whereas local officials believe the interveners are augmenting (rather than restraining) central authority: above n7, at 340, references omitted.

¹⁵⁵Hootan Shambayati, ‘Courts in Semi-Democratic/Authoritarian Regimes: The Judicialisation of Turkish (and Iranian) Politics’ in Ginsburg and Moustafa (Eds), *ibid*, pp283-303.

¹⁵⁶Ginsburg and Moustafa (Eds), *ibid*, p10.

¹⁵⁷Hilton Root and Karen May, ‘Judicial Systems and Economic Development’ in Ginsburg and Moustafa (Eds), *ibid*, pp304-325.

¹⁵⁸For example, in Egypt the move to rule of law rhetoric by Anwar Sadat (1970-81) to “distance himself” from the failure of the preceding Nasser regime (1954-70) to achieve revolutionary goals: Ginsburg and Moustafa (Eds), *ibid*, p11.

Critics of law and democracy theory argue that formal legal requirements, especially at the international level, in fact constrict and undermine democracy and the state. The advantage of this is that it maintains legal stability in face of the momentary whim of the community.¹⁵⁹ It has also been argued that the impact of international law ‘destabilises’ domestic orders, such as in several European states, by destabilising the relationship between the domestic courts called upon to apply the rules of international law which penetrate the domestic structure.¹⁶⁰

1.4.2 *Law and Economics*

Theories about the contribution of the rule of law to market economies take a similar form. Economic growth, it is said, progresses relative to the health of the rule of law within a state – the rule of law and “good governance” produce sustainable development.¹⁶¹ It appears that this is a response to predictability and enforceability as a core element of the rule of law, enabling investors as well as citizens to plan their business affairs with a level of regulatory certainty.

In fact, the emphasis of the World Bank, International Monetary Fund and international aid donors on the development of the rule of law is intended to produce efficient economic outcomes, through a predictable and economically liberal (procedurally) legal culture, in which obedience to laws is ingrained.¹⁶² Thus in its

¹⁵⁹However, Daintith also argues that democratic decision-making is not significantly different from the development of international rules through executive participation abroad, since domestic laws are developed and put to Parliament by the executive, at which time “the legislature does not so much make law as make the executive accountable for its lawmaking: Terence Daintith, ‘Is International Law the Enemy of National Democracy?’ in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p115), pp117-9.

¹⁶⁰For example, Dominique Remy-Granger, ‘The Ambiguities of the State Based on the Rule of Law; a Unitary System à la Française’ (p53); Heinhard Steiger, ‘The Relationship of German National Law with Public International Law and with European Community Law’ (p65); Wouter Hins, ‘An Ambiguous Story about Supremacy of EC Law; Report from the Netherlands’ (p85); and Thomas Vandamme, ‘Changing the Lawmaking Process in the Netherlands for the Sake of Implementation; a Question of Going Too Far and of not Going Far Enough’ (p97), all in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001.

¹⁶¹UN General Assembly Resolution 60/1 (2005), *2005 World Summit Outcome Document*, UN Doc. A/RES/60/1 (16 September 2005), para 11.

¹⁶²However, Chesterman makes the point that organisations such as the World Bank and the International Monetary Fund are specifically prohibited “from referring to political processes as such, ‘governance’ provides a convenient euphemism for exactly that.” above n7, at 347. This view of the free market as the result of governance constrained by law is not without critics. Gray, for example, argues that “free markets are creatures of state power, and persist only so long as the state is able to

international programs, the World Bank measures, among others, the confidence of actors in “contract enforcement, the police and the courts, as well as the likelihood of crime and violence.”¹⁶³ The free market result comes from the protection these forms tend to give to private property and contracting.¹⁶⁴

This economic theory of the rule of law is not the same as the economic theory of law. It is common ground for rule of law theorists that laws be general in their terms and universal in their application. This contradicts economic theories of law which prefer optimised implementation. For example, the cost of criminal enforcement is balanced against the cost of crime, determining the “optimal” balance between enforcement and tolerance. However, the principle of legality, strongly adhered to in civil law traditions, tolerates no criminal behaviour at all.¹⁶⁵ If Fletcher is correct, and the popular concept of the rule of law demands non-optimal implementation, then the necessary conclusion is that in the public mind at least, the rule of law is based on ‘principle,’ or rather something like Dworkin’s “principled consistency,”¹⁶⁶ aimed at an economic result, rather than an economic theory of the rule of law.¹⁶⁷ It is supported by the unwillingness of rule of law practitioners to take advantage of rights derogation in times of emergency, which are designed for the restoration of order, in favour of the pure rule of law blueprint.

Economic theories depart from typical explanations for the rule of law, which prioritise criminal justice and constitutionalism over other aspects of law, including property and personal status.¹⁶⁸ The core logic must be that, since many theorists essentially argue that the concept of the rule of law is one of ‘ordered liberty’ (to quote Rawls), then the system most likely to affect liberty itself is the area on which to focus greatest efforts. That is, all rule of law theories except this one can tolerate a level of non-legal self-ordering in some areas to preserve the greatest level of formal legality in the other. However, the result is reduced predictability and certainty -

prevent human needs for security and the control of economic risk from finding political expression.” John Gray, *False Dawn: The Delusions of Global Capitalism*, New Press, New York, 1998, p17.

¹⁶³As quoted in Chesterman, above n7, at 347 and the references he cites.

¹⁶⁴Stromseth et al, above n27, p58.

¹⁶⁵Fletcher, above n20, pp30-1.

¹⁶⁶Ibid, p32.

¹⁶⁷Nardin describes this as “law as economics because it makes law the servant of economic policy.” above n10, at 389.

¹⁶⁸Plunkett takes the view to its extreme, arguing that the ‘rule of law’ is a “functioning criminal justice system:” above n30, pp208-9.

those core values attributed to the ordering of liberty, which are of greater importance to these aspects of ordinary life, rather than a focus on crime as extraordinary behaviour in society. Economic rule of law theories respond to this.

1.4.3 Law and Development, and Post September 11 Rethinking

The result of the rule of law as an essential element of a free market economy and a liberal democratic state produces a summative theory of law and development, applied in the course of foreign aid as well as foreign intervention.¹⁶⁹ After 11 September 2001, a third step has been taken: the economic and democratic theories of the rule of law, via the theory of law and development, have produced a conclusion that the rule of law is antithetical to terrorism and threats to national and international security. That is, since the rule of law's rights focus is directed to eliminating abuses, it must therefore also eliminate the conditions which foster terrorism and violence.¹⁷⁰

The difficulty with all these approaches is that they are not concerned with the law, beyond the familiar allegedly immutable institutional forms. The goal is the promotion of liberal democratic and economic values as goals, not as constraints on government authority, particularly in US policy.¹⁷¹ Rule of law operations in Iraq provide a clear demonstration of rule of law discourse as Western liberalism in action. When the method proposed to achieve the rule of law as democratic development is the wholesale export of a legal system or systemic concepts of one state, then the cross-cultural problems discussed in the preceding section are realised. For example, critics of the law and development US aid program commencing in the 1960s objected to its "over-reliance" on exporting systemic US legal concepts,

¹⁶⁹It is this combination of efforts to use the institutional forms of the rule of law – constitutions, laws/codes, courts, judges and police – to encourage development in the Third World that dominated US foreign aid budgets from the 1970s onwards. Efforts began in Latin America, and after the end of the Cold War spread to the former Communist states in Europe. Their focus was "democratisation and decentralization, on the elimination of state abuses ... [and] efforts to promote capitalism and market-oriented reforms." They primarily focused on judicial training and the provision of American technical expertise to help nations 'modernise' their laws: Stromseth et al, above n27, p61. See also Carothers, above n19, p4.

¹⁷⁰Stromseth et al, *ibid*, pp59-60, references omitted.

¹⁷¹Nardin, above n10, at 389.

including “strategic litigation and activist judges, that were incompatible with the target countries.”¹⁷²

The criticism should also include the emphasis on constitutionalism in rule of law development, notwithstanding the absence of written constitutions in States that would self-identify as proponents of the rule of law, such as the United Kingdom. Even the United States constitution, which unlike continental constitutions does refer to certain specific human rights such as ‘due process of law,’¹⁷³ is silent on an explicit commitment to the rule of law. US constitutional authority has held that ‘due process’ means “the concept of ordered liberty” and must be implicit in constitutional interpretation.¹⁷⁴ There can be little clarity about the rule of law when theory turns directly to the benefits which are supposed to accrue from it, whether they be democracy, human rights or economic arrangements.¹⁷⁵ Nor can there be clarity about the nature of the desired end-state when its qualities are asserted to be desirable¹⁷⁶ but not always much more, leaving only “provincial ideas”¹⁷⁷ which are claimed to be universal.

At heart is the characterisation of the rule of law. All non-law-based theories discussed to date remain predicated on the rule of law as a result (a good in itself) or a situation which produces a result (that result being the good). Because of this, the theories must focus on elements of the rule of law which are capable of identification as results: courts, judiciaries, democratic parliaments, suitably certain and predictable laws, and human rights, which have not been subject to derogation. As results or situations cannot lend themselves to more than one definition, rule of law theorists must accept a theory of universality which has been shown to be culturally

¹⁷²Chesterman, above n7, at 346.

¹⁷³Fifth Amendment to the *Constitution of the United States*: “An individual charged with a crime is entitled to due legal process, cannot be tried twice for the same offense, and cannot be compelled to testify against him- or herself. The government cannot seize private property without just compensation.”

¹⁷⁴This domestic recognition of substantivism at least at the constitutional level in the US has developed far beyond the recognition of personal rights, or Right, in international law and now includes “unrestrained freedom of contract” as well as rights to abortion. However, it is limited by the theory of ‘originalism,’ by which “all basic rights [must] be spelled out in the Constitution.” Fletcher, above n20, p13, citing *Palko v Connecticut* (1937) 302 US Rep 319, *Lochner v New York* (1905) 198 US Rep 45 and *Roe v Wade* (1973) 410 US Rep 113.

¹⁷⁵Chesterman, above n7, at 360.

¹⁷⁶Nardin, above n10, at 396; Brian Tamanaha, *On The Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p13.

¹⁷⁷Nardin, *ibid*, at 388-9.

unsupportable without a non-existent core agreement about the nature of law, the nature of rule or governance, and the nature of the rule of law. The only coherent solution is an altogether different conception of the rule of law as a relationship, or social dialogue, between the subjects of law and the authority of law. Such a theory neither demands universal institutions nor universal values.

1.5 The Rule of Law as a Relationship

The rule of law as a relationship rather than a result is relatively new to international rule of law discourse. Its main proponent is Nardin, who advocates a definition of a “specific kind of relationship, a relationship based on non-instrumental law.”¹⁷⁸ In this relationship normative non-instrumental rules emanate from law as *legitimate* authority to achieve the end identified by the community of subjects, not uncontrolled power.¹⁷⁹ Instrumental rules which set out the “unalterable status of human personality that the moral relationship presupposes” control the variable outcomes desired from instrumental rules.¹⁸⁰

The advocates of relationship theory are interested in the developing perception of the community of legal subjects of the legitimacy of their legal system. The rule of law in this environment is neither universal nor stationary. Koskeniemi argued that the definition of law has to be such as to preserve the moral content of legality and therefore needs to be responsive to developments in ideas such as justice. Its responsiveness to social change should not reduce it to a “discursive idea of democracy” but accept the rule of law as “a distinct mode of association among persons whose status as human beings is a matter of ‘nature’ or ‘reason’ rather than

¹⁷⁸Ibid, at 395.

¹⁷⁹Ibid, at 394. Nollkaemper, reviewing the origin and case law of the International Criminal Tribunal for the former Yugoslavia, uses ‘legitimacy’ as a shorthand for “the justification of the authority of the law” with both formal and substantive understandings: André Nollkaemper, ‘The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia,’ in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p13), p13. Glennon’s view is that law is a “limit on self-dealing,” in which consent to be bound is given on joining (or remaining) in the community of subjects. This consent is his legitimacy of law: Glennon, above n67, p146.

¹⁸⁰Nardin, above n10, at 394.

‘convention’ or ‘decision.’”¹⁸¹ Thus the only universal requirement of the rule of law is the mutually accepted nature of the participants in it.

At the international level, the role of consent arising from sovereign equality fills this role.¹⁸² Rather than being a barrier to universality (and therefore the rule of law), consent is a prerequisite for the rule of law since if states and communities cannot consensually agree to universal norms then they cannot be universalised. However, “the traditions of the international legal system appear to work against the ability to legislate universal norms.”¹⁸³ Does international law demonstrate a system where the foundation relationship of law is so restrictive as to prevent its own development?

The logical flaw in Nardin and Koskeniemi’s system is the supposition that if reason produces an agreed moral status of humans as equals, that should lead to justice based on reason. It is a fallacy to assume that the community will necessarily decide on its non-instrumental and instrumental laws with any element of reason, or that legitimacy, in the sense of social acceptability, is a function of reason.¹⁸⁴ Morgenthau and Schmitt, in the immediate pre- and post-World War Two periods both tended to agree, concluding that no rule of law could realistically require or facilitate the depoliticisation of power struggles for arbitration by independent judges. In fact, since all conflicts were essentially political, defining them in other terms, moral or legal, simply intensified them “by substituting totalising ideologies for pragmatic accommodation.”¹⁸⁵

¹⁸¹Ibid, at 392, discussing Martti Koskeniemi, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge, 2001.

¹⁸²Indeed Charney picks up on a thread of theorising which argues that the “freedom of states to control their own destinies and policies has substantial value” in permitting the choice of social ordering: Jonathan Charney, ‘Universal International Law’ (1993) 87 *AJIL* 529, at 530. This view of international law presupposes a freedom of states to determine legal ordering which may not necessarily survive today, given the elevation of certain individual rights to *ius cogens* status and the determination of minimum legal standards for domestic criminal justice: compare *US v. Altstötter et al* (1948) 3 TWC 1 (1948) (“*Justice Trial*”) and *Case Nr1/9 First/2005 al-Dujail Case*, Iraqi High Tribunal, 2006 (“*Dujail Trial*”), judgment translated unofficially from Arabic to English by Mizna Management LLC, available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>, viewed 6 October 2009. This is explored further in Chapter Four below.

¹⁸³Charney, *ibid*, at 530.

¹⁸⁴That is, the problem is the subordination of the categorical imperative to comport with morality based on reason to the Nietzschean Superman “who acts solely for his own gratification.” Glennon, above n67, p171.

¹⁸⁵Nardin, above n10, at 388-9.

Understanding the rule of law as a relationship is consistent with much of current theory. It simply rethinks the concept and explains the failure of most ‘rule of law programs’ to date. Analysing Stromseth’s argument, in which the institutional forms of the rule of law which support peaceful democracy and development must be matched by a cultural commitment from the subject community to uphold the rules and institutions,¹⁸⁶ the latter is the rule of law relationship, the former merely its momentary form, perhaps the most popular contemporary relationship but by no means the only possible manifestation.

1.5.1 The Risk of Indeterminacy

Traditional approaches to the rule of law, formalism in particular, overcome the risk of a too-broad scope for a rule of law relationship. The emphasis on certainty of form and process in formalism, the desired uniformity of values in substantivism and the mix apparent in modern blue-print approaches provide a reassuring core in defining the rule of law. The range of possible rule of law relationships is unlimited for Koskenniemi, however, who defines it negatively.¹⁸⁷ That said, certainty through uniformity in traditional approaches should not always be interchanged with immutability. Traditional formalist certainty and predictability of rules does not preclude an acknowledgement that rules certain on their face may be capable of different contexts and meanings, particularly over time.¹⁸⁸ Substantive values may develop, so long as their application is on a universal human basis. Some formalists even allow some “virtues” of the formal rule of law to be set aside by the subject community to allow the achievement of other necessary ends.¹⁸⁹ The risk, however, is losing the rule of law in post-modern relativism, in which the only requirement to create a rule of law relationship is the existence of public discourse.

The proposed limit to indeterminacy is the underlying acceptance of human moral equality as subjects of law.¹⁹⁰ While universally indeterminate, the rule of law has a determinate meaning within each society professing it, in the form of the characteristics of its independent rule of law relationship. This is in fact consistent

¹⁸⁶Stromseth et al, above n27, p4.

¹⁸⁷Koskenniemi, above n181, p507; and see Nardin, above n10, at 390.

¹⁸⁸Nardin, *ibid*.

¹⁸⁹Including Craig, above n11, at 469.

¹⁹⁰Nardin, above n10, at 391.

with traditional rule of law formalism, but has the benefit of overcoming the problems of universality. Nardin, though, does not subscribe to the total indeterminacy of post-modern theory: he asserts that to create the rule of law, there must be law, and if law is entirely policy-based and indeterminate, then law “as a distinct mode of human relationship” is erased.¹⁹¹

The prerequisites of a rule of law relationship then are the acceptance of “permissible coercion” and the existence of non-instrumental rules identifying laws which are predicated on an equal moral relationship between citizens.¹⁹² The moral equality of legal subjects, however, is not fully described – for example, if a society asserts that men and women are formally equal but are different and ought therefore to be treated differently in certain respects,¹⁹³ it is not clear whether either Nardin or Koskenniemi would accept this as a potential rule of law society. The acceptance of human equality as the foundation of a future rule of law relationship is demonstrated in the calls of the community in the penal colony in New South Wales, then under military governance for a “legislative assembly and trial by jury” in 1819, putting aside the existing relationship of prisoners, guards and free settlers.¹⁹⁴

The possibility of rejecting societies from the scope of the rule of law is one of the positives Nardin sees in defining it as a relationship, because it retains meaning and determinacy in the concept.¹⁹⁵ However, in this example, moral equality but not equivalency could be accepted but differentiation in instrumental rules would be necessary to preserve it. End-state rule of law theory would also reject this as discriminatory or insufficiently general law.

¹⁹¹Ibid, at 401.

¹⁹²“It is important to note that these rule-of-law criteria are not themselves the outcome of an authoritative decision. ... Unlike enacted law, they cannot be altered or annulled by authority:” *ibid*, at 395. They are complemented by secondary, instrumental rules setting out procedural constraints on legal officials traditionally associated with the rule of law, including freedom from arbitrariness and the prohibition on secret or retrospective laws, which prevent officials acting outside the law: *ibid*.

¹⁹³Some religious laws posit such an approach on their face. The Old Testament begins with religious equality in Genesis 1:27 but describes different gender roles in the New Testament, for example I Timothy 2:8-12 and I Peter 3:4-8. The Quran also reveals spiritual quality in 3:195, 4:124 and others, but differing gender roles, for example 4:34. This thesis does not attempt any interpretation of these religious passages beyond this observation.

¹⁹⁴Neal, above n21, p20, references omitted.

¹⁹⁵Nardin goes on to dismiss a growing research school dedicated to defining an “Asian rule of law” with different features to what might be seen as Western rule of law for this reason: above n10, at 397.

1.5.2 *The Permissibility of Coercion*

Coercion is also problematic. Nardin rejects the Weberian state as a coercive association in which the coercion is accepted as legitimate by its subjects because, while instrumental rules are not fixed in content, moral equality has not been institutionalised as the core value of the system.¹⁹⁶ He uses non-instrumental rules to distinguish between permissible coercion, which is essential to the rule of law relationship, and impermissible coercion, which is a feature of the authoritarian state.¹⁹⁷ The coercion debate defines the rule of law relationship in two ways: vertically, between the citizen and the legal authority, but also horizontally, between each member of the community as moral equals. Only the state professing both relationships is a rule of law state:

As members of that association – ‘citizens’ – they are associated not only with government but also with one another. The subjects of a managerial state, in contrast, are associated only with the manager.¹⁹⁸

Laws in the latter state would be instrumental, but not necessarily in the former where subjects pursue self-chosen ends without interference except to prevent interference in each other’s freedoms. In such a state, coercion is available and perhaps necessary to *prevent* unjust coercion.¹⁹⁹ Therefore, according to this theory, coercion is both a limited permissible means to enforce the rule of law, and also the right of the citizen to displace a non-rule of law system.

1.6 **The Concern of International Law with the Domestic Rule of Law**

The overt concern of international law with the rule of law – that is, its actual recognition in the existing system – is with a substantive concept, and the self-consciousness of the international system picks up closely on the asserted links between law, democracy and economic development. When speaking of the international rule of law, three things could be meant:

¹⁹⁶Ibid, at 393.

¹⁹⁷Ibid, at 394.

¹⁹⁸Ibid, at 393.

¹⁹⁹This is the familiar Kantian, “classical liberal” understanding of a morally legitimate state: Nardin, *ibid*, at 392-3. Rawls argues that acknowledging this is the “basis of rule of law theory:” above n26, pp235-43.

- a. Rule of law theory applied to subjects of international law (primarily but not exclusively states);
- b. The privileging of international over national law, in a 'rule of international law,' establishing, for example, the primacy of human rights covenants over domestic legal arrangements; or
- c. A 'global rule of law' in which "a normative regime that touches individuals directly without formal mediation through existing national institutions."²⁰⁰ This increasingly results from the emphasis on individual human rights, which, like the ancient Islamic law (*siyar*), begins to recognise "the individual as a subject on the international plane."²⁰¹ As a result, one "might speak of a global rule of law in a possibly nascent legal system in which individual human beings have rights and duties unmediated by national institutions."²⁰²

It is the combined effect of all three aspects which produces the 'international rule of law' as currently formulated.

Realists argue that since international law can never be law but only politics, it can never embody the international rule of law in any of these three meanings.²⁰³ The current mood of international law defies realism, with constant demands for certain ideals and efficacy within and without the state. Accepting this as fact requires the pursuit of law in international relations, where law is the "product of decision and an instrument of policy and power."²⁰⁴ The assumptions on which this depends are:

²⁰⁰Chesterman, above n7, at 355-6.

²⁰¹Khadduri, above n52, p69.

²⁰²Nardin, above n10, at 399.

²⁰³Ibid, at 386. Political realists argue that that the political "stakes" for states are too high to allow anything more than pragmatism in international relations, at 387.

²⁰⁴Ibid. See also Hilary Charlesworth, 'Feminist Ambivalence about International law' (2005) 11 *International Legal Theory* 1.

- a. the coming together of “sovereign territorial groups,” each forming a domestic legal system, to form an international community subject only to the restrictions of international law;²⁰⁵ and
- b. the existence of sovereign equality at the international level, derived from the moral equality of citizens, which is in turn derived from nature.²⁰⁶

These two assumptions allow the formation of a Nardinian international rule of law relationship. It has been asserted that the emphasis on sovereign equality for the international rule of law is misplaced, given domestic differentiations between juridical persons.²⁰⁷ Rather the focus ought to be on the character of the state or international system’s coercion over its subject in the absence of choice or consent to participation.²⁰⁸

1.6.1 Realism and Equality in the International Rule of Law Relationship

A substantial criticism of the international rule of law relationship is that the formal equality of participants in international law, as a foundation of the rule of law,²⁰⁹ is not reflected in actual arrangements. The voting arrangements of the United Nations Security Council, in which only five nations hold a permanent power of veto, is held out as evidence that some states “are more equal than others,” particularly where Security Council Resolutions purport to express a quasi-legislative power.²¹⁰ Its decision-making process and practice makes equality “nonsensical” and “institutionalizes a form of self-dealing that is, indeed, antithetical to the very notion of the rule of law.”²¹¹ This is not altogether surprising, given the Charter attempted to “replicate the existing power structure,”²¹² rather than constrain it, as the rule of law would require, or even represent law *as* power.

²⁰⁵Khadduri, above n52, p1.

²⁰⁶Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, 1758, Book 2, lxiii (translated by Charles Fenwick, Oceana, New York, 1964).

²⁰⁷Chesterman, above n7, at 360.

²⁰⁸Ibid.

²⁰⁹Article 2(1), *Charter of the United Nations*, 24 October 1945, San Francisco, 1 UNTS 41, entered into force 1 November 1945 (“UN Charter”).

²¹⁰Chesterman, above n7, at 354.

²¹¹Glennon, above n67, pp151-2.

²¹²Ibid, p153.

The suggestion that the General Assembly better expresses international democracy is also exploded by the realities of self-interested power politics. In the acceptance of sovereign equality, it ignores population, wealth, respect for community order or the well-being of a state's own people.²¹³ Chesterman doubts whether the UN, in fact or capacity, can embody the rule of law.²¹⁴ Indeed, the system of UN organisations, in which economic and human rights sub-agencies are restrained by the scope of their delegated authorities, distinguishes international relations from the “autonomous and complete” domestic legal systems which are traditionally associated with the rule of law.²¹⁵

Equality of participation in the international system does not necessarily produce an international rule of law in which the law is applied equally to all. A strident criticism of recent times is that the enforcement of international law is anything but equal (which critics translate as consistent), for example the exercise of Charter powers to maintain peace and security in the Middle East, where it is alleged that Security Council actions are actually biased by the national interest of permanent members.²¹⁶ This, it has been claimed, amounts to a “qualitatively different” international law for Middle Eastern states.²¹⁷

While some aspects of this criticism are distinctive to the character and composition of the UN Security Council, and post-war collective security arrangements,²¹⁸ as the UN Charter centralises coercive authority to restore “international peace and security” in that body,²¹⁹ it is indicative of a disjunct between the theory and practice of equality in the application of international law. In

²¹³Ibid, p151.

²¹⁴Chesterman, above n7, at 354.

²¹⁵Ibid, at 355.

²¹⁶Jean Allain, *International Law in the Middle East: Closer to Power than Justice*, Ashgate, Aldershot, 2004, p127.

²¹⁷Ibid, p161. Brownlie agrees in a strident criticism of the Security Council for selective and unprincipled exercise of legal authority in its response to Libya's refusal to surrender the suspects in the case of the Lockerbie bombing: Ian Brownlie, *The Rule of Law in International Affairs*, Martinus Nijhoff, The Hague, 1998, p224, considering UNSC Resolution 731 (1992).

²¹⁸Glennon, above n67, p153. The composition and practice of the Security Council is currently and has long been subject to review and debate: most recently see Jakob S. Lund and Daniel Safran-Hon, ‘Third Round of Intergovernmental Negotiations on UN Security Council Reform Conclude,’ 63rd Plenary Session of the UN General Assembly (1-3 Sep 09), Centre for UN Reform Education, <http://www.centerforunreform.org/node/407>, viewed 11 October 2009. The session voted to continue discussions into the 64th Plenary Session.

²¹⁹Article 42, *UN Charter*, except for force used in self-defence pursuant to Article 51, which is to be reported to the Security Council.

place of Nardin's human equality as the foundation of the rule of law relationship, actual practice demonstrates a 'hegemonial approach' to the application of law, in which the relative power of the protagonist affects the obtaining of "legal approval" for its actions.²²⁰

1.6.2 *International Intervention in the Domestic 'Rule of Law'*

The power dynamics of the current international rule of law are further challenged in circumstances where the domestic collapse of the rule of law in a state, or of the state itself, attracts international intervention.²²¹ These 'rule of law interventions' are a self-conscious attempt by the international system to maintain its *own* rule of law system, which cannot survive without the consistent rule of law, however formed, in its constituent parts. The standard by which international law measures the rule of law is by human rights based democracy, as above. The provisions of the *Universal Declaration of Human Rights 1948* "broadly correspond" to the fundamental principles of the rule of law agreed among theorists, expressing its judicial institutionalist focus.²²² It is, therefore, a substantive view.²²³ This is notwithstanding the formal derogability of fair trial right outside the explicit context of armed conflicts attracting the protection of the Geneva Conventions.²²⁴

The contemporary international community features states in a variety of circumstances, including emergency. Saikal describes several categories of states, which due to failures of the rule of law, administrative efficacy and resilience, and "tolerant pluralism," are unable to operate independently:²²⁵

²²⁰Brownlie, above n217, p33. See also feminist critiques of domestic and international law, for example Charlesworth, above n73, pp83-95.

²²¹Disrupted states include Afghanistan since 1978, Lebanon during its civil war (1974-89), and Somalia after the overthrow of the regime of Mohammed Siad Barre. Would-be states often emerge in the break-up of larger states, such as Bosnia-Herzegovina. Embryonic states include pre-independence Namibia, the Baltic states and East Timor: Amin Saikal, 'The Dimensions of State Disruption,' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p17), p17.

²²²Chesterman, above n7, at 358-9. For example, the right to a form of trial in Article 10 compared to fair trial in Article 14, ICCPR.

²²³Tolbert and Solomon, above n14, at 32-3. But compare Chesterman, *ibid*, at 344, who distinguishes between the substantive values by including specific rights, and the manner in which he argues that the rule of law promotes rights generally.

²²⁴See text accompanying n128 above.

²²⁵Saikal, above n221, p18.

- a. 'disrupted' states, where open conflict does not affect international recognition of the state itself, such as Afghanistan since 1978 or Lebanon during its 1974-1989 civil war;
- b. would-be states, for example now-recognised Bosnia and Herzegovina which was challenged by Serbia in the break-up of the former Yugoslavia, contested by neighbours so as to prevent their consolidation;
- c. "embryonic states" under contested occupation and facing pressure to permit self-determination, including East Timor and "to some extent" Kashmir;
- d. states subject to international control, whether by sanctions or intervention, for violations of international law, such as Iraq after 1990; and
- e. states which would disintegrate but for military control, including Pakistan.²²⁶

All these categories of states have prompted intervention. Significantly, the causes of the disruption centre on the breakdown of the social order through sectarianism, "ethnic antagonisms" ideology, economic collapse, "a specific legitimacy crisis," or separatism.²²⁷ Recalling Rawls' linkage of the necessity for rules with the ordering of liberty, it is the breakdown of the social order which is inextricably linked with the break-down of the rule of law within a state.

The self-consciousness of international law to its own substantive, rights-based definition of the rule of law is evident in its refusal to accept the status quo of disrupted states as a necessary or justified part of the international legal order: human rights treaties make the rule of law a requirement for an internationally-recognised

²²⁶Ibid, pp18-20. These examples are among those provided by Saikal in his analysis.

²²⁷Ibid, pp20-2.

state, development agencies both national and international consider it “essential for economic growth” and “more recently security actors, notably the UN Security Council, have promoted the rule of law as a form of conflict resolution.”²²⁸ Increasingly, the rule of law is being used obliquely (but rarely explicitly) as a justification for intervention, as part of a broader mission to restore security, which to that extent is contrary to the general prohibition on the use of force in Article 2(4) of the *UN Charter*.²²⁹

Scholars conservatively argue that rights-based humanitarian intervention is evolving and that, by analogy with the Security Council finding of a threat to international peace and security in an overflow of refugees across borders, the lack of the rule of law, as internationally recognised, is a humanitarian and security concern which can, and will increasingly, permit intervention.²³⁰ It has even been suggested that interveners’ efforts to create rights-based structures as a domestic rule of law can positively affect an intervention which might otherwise lack legitimacy in international law.²³¹

The phrase ‘rule of law’ was first used operatively in Security Council Resolution 1040 (1996) for the Secretary-General’s work “to promote ‘national reconciliation, democracy, security and the rule of law in Burundi,’” although the ‘rule of law’ was rendered in French as *‘le rétablissement de l’ordre.’*²³² Where the UN does authorise such an intervention addressing significant rule of law issues, it often takes the form of UN transitional administration, which temporarily supplants self-rule in part to rebuild justice systems and recreate the rule of law.²³³ Given the

²²⁸Chesterman, above n7, at 343.

²²⁹Other than in Article 51 self-defence, and in sharp counterpoint to the declaration in Article 55 that member states are to “promote and encourage respect for human rights and for fundamental freedoms.” Stromseth et al, above n27, p24.

²³⁰Stromseth and her colleagues, while not committing to a “clear or uncontested” right of intervention, are able to point to a number of interventions during the 1990s, including NATO in Kosovo and Coalition intervention to protect Iraqi Kurds, concluding that at a minimum such interventions were “excusable breaches” of the Charter rules: *ibid*, p38 and see p3; also Chesterman, above n7, at 348. This is the subject of succeeding chapters.

²³¹Stromseth et al, *ibid*, pp51-2, as in Kosovo and Iraq in 2003. However, such efforts could not confer lawfulness on an intervention in breach of international law, unless there is a purely rule of law-based right of intervention: see Chapter Four below.

²³²Chesterman, above n7, at 348, references omitted. The French rendering as the “re-establishment of order” will become significant in Chapters Three and Four.

²³³Tolbert and Solomon, above n14, at 42. Recent examples are the UN Transitional Authority in Cambodia (UNSC Resolution 745 (1992)), UN Mission in Kosovo (UNSC Resolution 1244 (1999)) and UN Transitional Authority in East Timor (UNSC Resolution 1272 (1999)).

theoretical background, this is an ambiguous term which does not point to any objective outcomes by which to measure the end of the need for UN intervention. It permits the overwhelming theoretical and international preoccupation with institutional forms and criminal justice to dominate a problem they are not suited to resolve.²³⁴ This is the subject of Chapter Four of this thesis.

It can also be a simplistic solution. Chowdhury, for example, explicitly and solely links the problem of the rule of law in states of emergency with the (non)-derogability of human rights norms,²³⁵ overlooking security concerns as part of the democratic peace approach. It would follow, in his view, that the restoration and application of non-derogable human rights solves domestic rule of law problems. This conclusion typifies the international rule of law relationship – it implicitly requires not simply sovereign equality as the underlying condition for international participation, but participatory equality derived from equality (or better, equivalency) of rights-based institutions, procured through intervention if necessary.

1.7 The Pursuit of Universality in the Current International Rule of Law Relationship

The three essential characteristics of the international rule of law relationship are therefore: the existence of states as participants, the sovereign equality of such states and the existence of human rights-based instrumental rules governing the legal flowering of the relationship. The first is a precondition – it merely highlights the character of the subjects of the law. The second provides Nardin's moral foundation to the establishment of a rule of law conversation. The third is not without disagreement. It has been said, for example, that the foundation of the law between states is non-aggression, or, alternately, collective security,²³⁶ rather than rights.

²³⁴Chesterman, above n7, at 348-9; Tolbert and Solomon, above n14, at 42. The preponderance of institutionalism and criminal justice is demonstrated in the *United Nations Basic Principles on the Independence of the Judiciary*, UN General Assembly Resolutions 40/32 (1985) and 40/146 (1985).

²³⁵Chowdhury, above n92. Stromseth and her colleagues also link human rights abuses with the absence of the rule of law, which lead, they say, to the recurrence of violence if not dealt with by the intervening force: Stromseth et al, above n27, p7.

²³⁶For example, Charney sees the UN Charter and its collective security system as "central" to international law:" above n182, at 543. Stromseth and her colleagues pick up both human rights and non-aggression: Stromseth et al, above n27, p26.

However, it is not difficult to construe the latter in rights terms, especially as a right to intervene to protect against and punish human rights abuses.

It is concerning that international rule of law discourse, instead of conversing about the rule of law as an international mode of association, postulates it as “a *universal* mode of association,” affecting domestic as well as international law.²³⁷ In some ways this can reflect tensions within multicultural or multiethnic states, in which there may be multiple “micro rule of law” societies within a state, but the peacekeeping mission is seen as ‘harmonising’ them under the overarching system.²³⁸ The international rule of law cannot exist coherently without the separate existence within its constituent states of a reasonably similar and consistent rule of law in its dominant features. States which choose not to, or unable to, comply with the international standard are subjected to pressure to reform their systems or otherwise treated as pariah states. It is the essence of Waldron’s demand for “general public norms” to have a system of law, which may operate within the rule of law.²³⁹ That is the reason why international human rights law attempts to impose an external universality of principle; without it, international law is incapable of demonstrating an internal coherence of principle and the rule of law. In this sense, coherence requires the exclusion of non-conforming states as full and equal participants in the international sphere.

A comparison with the early Islamic *siyar*, a branch of religious law regulating the relations of the Islamic state with non-Islamic communities external to it, and, as tolerated religious minorities within it, is instructive. It too attempted to resolve the problem of creating an ordered and universal world society.²⁴⁰ Where the modern state arguably now exists to facilitate the exercise of self-determined sovereignty by its population and to protect and facilitate their human rights, Islam and the *siyar* conceived of the state as a means to achieve an ultimate religious

²³⁷Nardin, above n10, at 401.

²³⁸Plunkett, above n30, pp211-2. Demonstrating the importance of Plunkett’s harmonisation, the decision of the Pakistani government to allow such a ‘micro rule of law’ within its territory, by permitting the introduction of Shariah courts in the northern Swat Valley in April 2009 without appeal to the Pakistani High or Supreme Courts, was heavily criticised as fostering insecurity in Pakistan: for example, Farhan Bokhari, ‘Judicial Independence for Swat Threatens Integrity of Pakistan,’ *Jane’s Defence Weekly*, 22 April 2009, p5. The need for consistency for security at domestic level reflects the contradictions of the international rule of law.

²³⁹Waldron described such norms as being identified “in the name of the whole society:” above n38, at 24.

²⁴⁰Khadduri, above n52, p3.

objective.²⁴¹ As a result, the *siyar* divided the world into the *dār al-Islām* (the house or territory of Islam) and the *dār al-ḥarb* (the ‘territory of war’). The communities of the *dār al-ḥarb* were regarded as being in a ‘state of nature,’ lacking legal competence to enter into equal and reciprocal intercourse with Islam because they failed to conform to its ethical and legal standards. Necessarily, legal arrangements with the *dār al-ḥarb* were to be temporary, because the territories were not recognised as legal entities in Islamic law.²⁴² The law of war (*jihād*) was the *siyar*’s chosen means of interface between the two worlds. Its purpose was to preserve the integrity and internal coherence of the Islamic rule of law by managing domestic relations in other States with which it dealt.

In the modern, secular law of nations it is human rights, rather than war, which are accepted in international discourse as the “mediator” between national and international rules of law.²⁴³ Dialogue about the content of instrumental rules does not require that there be an absence of disagreement about the content of human rights as the value which international law uses as the measure of the rule of law. Indeed the absence of discussion or criticism would indicate a withering of the rule of law relationship.²⁴⁴ However, there must be a modicum of agreement about the manner in which human rights is to govern the international order, including among state participants – that is the minimum necessary understanding of the “public good” which the participants of a legal system agree is the outcome of its instrumental rules. Glennon is thus correct when he asserts that “consensus is necessary as to both ends and means” for the rule of law,²⁴⁵ but consensus need not necessarily equal uniformity.

1.7.1 *Universality and Uniformity in Rights Practice*

Lack of total uniformity among participants in international law has long been accepted as a systemic feature, although early Western cases justified it with

²⁴¹Ibid, p5.

²⁴²Ibid, pp12-3, reference omitted.

²⁴³Nardin, above n10, at 399, referring to Gerry Simpson, ‘Two Liberalisms’ (2001) 12 *EJIL* 537, although they recognize on-going dispute as to its content and even “whether it is the proper mediator.”

²⁴⁴Summers, above n13, at 128, in the context of domestic rule of law where he ascribes the critic’s role to the “special clientele” of the rule of law: lawyers, judges, law students and legal academics.

²⁴⁵Glennon, above n67, p175.

arguments about cultural superiority.²⁴⁶ While such explicit arguments have fallen by the wayside in post-1945 international law, there remains scope for differentiation in the application of the agreed instrumental rules.

What legalist rule of law theorists tend to overlook in international law is the on-going conversation which has always existed about the underlying principle, or the non-instrumental rules, governing international relations. It was not until the Thirty Years War and the 1648 Peace of Westphalia that sovereignty supplanted religion as the organising principle of international relations.²⁴⁷ The modern reliance on human rights has also led to suggestions that they may emerge as the new organising principle in international legal society.²⁴⁸ The recognition of human rights now, and indeed the older recognition of sovereign supremacy, as the public good which the international rule of law is to achieve, does not stand in the way of the change in the principled basis of the rule of law internationally as time passes and society develops. Kleinfeld, while accepting that new rule of ends “can be discovered,” suggests that the process occurs through “reinterpretation or re-emphasis of old ideas,” albeit in a lengthy process.²⁴⁹ This is consistent with her view of the rule of law as a set of ends, but not necessarily of the rule of law as a relationship. It cannot be impossible, whether likely or not, for there to be altogether new ideas added as non-instrumental rules.

1.7.2 *The National / International Interface*

Critics of international law as a rule of law system focus not on the concepts agreed as the foundation of the law-based relationship between participants in the system, but on the system’s institutional forms. This is a carry-over from the misplaced preoccupation of rule of law thinking with institutional formalism. To

²⁴⁶Sir William Scott declared that the “inhabitants of those countries [in the Ottoman Empire] are not professors of exactly the same law with ourselves; in consideration of the peculiarities of their situation and character, the Court has repeatedly expressed a disposition not to hold them bound to the utmost rigour of that system of public law, on which European states have so long acted, in their intercourse with each other:” *The Madonna del Burso* (1802) 4C Rob 169, High Court of the Admiralty. A similar comment was made with respect to Algeria by the same judge in *The Fortuna* (1803) 2C Rob 92. See also Khadduri, above n52, p66.

²⁴⁷Glennon, above n67, p149.

²⁴⁸“In the 21st century human rights will be the fundamental basis for defining international relations,” the Polish Foreign Minister declared during NATO’s intervention in Kosovo: Barton Gellman and Steven Mufson, ‘Humanitarian War: Conflict Tests a Paradigm of Values-Based International Action,’ *Washington Post*, 6 June 1999, at A20.

²⁴⁹Kleinfeld, above n36, p36.

some extent this is unavoidable, since the crystallisation of the rule of law relationship must be “institutionalized in rule making processes, in rules, in interpretative and applicational methodologies, and in processes of judicial and other enforcement.”²⁵⁰ The error is in assuming that those institutional forms are self-evidently the institutional forms of the rule of law. Thus, political realism misses its mark when arguing there can never be an international rule of law because the standard institutional forms of mandatory legislature and binding courts do not exist. These institutional forms are not “contingently necessary.”²⁵¹ This is distinct from legal realism which argues, as above, that law itself is “conceptually impossible.”²⁵² The attraction of the approach is the scope it offers to quantify objectively the rule of law.²⁵³

More importantly, political realism is not consonant with the universal *self-consciousness* or *self-awareness* of international law and its actors as to the rule of law as a conscious restraint on action and an ideal to be achieved; nor is it consonant with the notion of the rule of law as a process. Further, the institutionalist, realist view struggles to put aside the existing features of the international legal system and deal with the distinction between the definition of a legal system (ie a prerequisite for the rule of law), and an assessment of its efficacy.²⁵⁴

International law’s self-awareness of its instrumental rules – its definition of the public good as the observation of normative human rights guarantees – is evident in the concept of *ius cogens*. *Ius cogens* are distinguishable from ordinary principles of law, because they are said to originate in natural law, and therefore to be universally applicable and self-evidently binding.²⁵⁵ There can be no derogation from

²⁵⁰Summers, above n13, at 129. Compare Chesterman, who criticises the “primitive” character of the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, adopted by UN General Assembly Resolution 2625 (XXV) (1970), UN Doc. A/5217 25 GAOR Supp (No 28) (1970) and the *Millenium Declaration*, adopted by UN General Assembly Resolution 55/2 (2000), UN Doc. A/RES/55/2 (2000), which challenge rule of law formalism by questioning “whether the process of international rule-making can itself be said to be governed by laws.” He demonstrates this through the “voluntary jurisdiction” of international judicial institutions and the “myth” of sovereign equality: Chesterman, above n7, at 357.

²⁵¹Nardin, above n10, at 391, 398.

²⁵²Ibid, at 391.

²⁵³Compare Norton Moore’s desire to end “the seemingly neutral ‘even handed cop-out’ that portrays all government structures as equally advantageous or appropriate.” Norton Moore, above n87, at 851.

²⁵⁴Nardin, above n10, at 398.

²⁵⁵Charney, above n182, at 540.

them, not even by persistent objection.²⁵⁶ Although non-instrumental rules must be exempt from objection in a rule of law community, the international existence of the persistent objector rule is indicative of the dialogue between participants which is the essence of the rule of law system – objection by participants in legal discourse. It is the instrumentality of the system which ultimately determines the outcome,²⁵⁷ reminiscent of ‘ordered liberty.’ To universalise legitimacy, there have been other changes in the recognition and formation of international law, including the shift to “more structured” multilateral fora away from the “traditional” means of forming and identifying customary law in individual state practice and *opinio iuris*.²⁵⁸

Where there is military, political or financial intervention by a foreign State,²⁵⁹ the internal social dialogue as to the rule of law is disrupted, perpetuating the apparent need for intervention to resolve rule of law collapse. Where the mandate for intervention comes from the UN, further difficulties arise because of the status of the UN as an intervener. When States intervene in other States, the universality of human rights law at least purports to impose a common standard which all interveners are bound by their own obligation to observe (if not necessarily enforce). The UN, on the other hand, is a non-State body which has increasingly “assumed State-like functions,” including transitional administrations, while its obligations under human rights laws are unclear. There is little judicial authority clarifying the point, or indeed any aspect of validity of Security Council action, although the International Court of Justice held by majority that its jurisdiction was not displaced by subsequent Security Council Resolutions in the *Lockerbie Case*.²⁶⁰

Intervention poses this conundrum for international law: the international rule of law cannot exist without a compatible domestic rule of law system in each of its

²⁵⁶Cassese argues, alone, that the so-called persistent objector rule should apply to rules of *ius cogens*. If accepted, states that pressed persistent objection in a timely manner to emergent norms would not be bound to comply with that norm as of law: Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1986, p178. This leads some international lawyers to identify a legislative, norm-creating capacity in the international community, albeit not located in a single institution: Charney, above n182, at 542.

²⁵⁷*Ibid*, at 540, references omitted.

²⁵⁸*Ibid*, at 543 and 550, and see generally in support Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, New York, 1990.

²⁵⁹Identified as a cause of state disruption: Saikal, above n221, p22.

²⁶⁰*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Preliminary Objections)* (1998) ICJ Rep 115 (Judgment of 27 February 1998). The case offers only modest support to judicial review of Security Council action.

constituent units, and therefore authorises intervention to procure a domestic rule of law capable of supporting the rule of law internationally (rather than for the pure domestic good). However, by intervening to create the rule of law, international law destroys it in the bud because the rule of law can only emerge internally in its subject community. In principle, “if the rule of law is a mode of association among free persons, natural or artificial, the rule of law among states is compatible with authoritarian or managerial rule within each state,”²⁶¹ but the instrumental rules of international law are predicated on a public good which does not allow that. Even the emphasis of Stromseth and her colleagues in describing the third feature of their “synergistic” approach to rule of law efforts as the “deeply political” nature of rule of law reform and the need to understand the interaction and effect of activities at all social levels for the projected society,²⁶² does not resolve the fundamental contradiction of the international rule of law.

1.8 Conclusion

Chesterman recognises the rule of law as international political idealism, but not “normative reality” given the conduct of much international relations in diplomatic rather than legal forms.²⁶³ However, it is conceptually possible to concede several points. International law could be law. It could and does demonstrate non-instrumental rules governing the conduct of the relationship between the governed (individuals and States) and the system.²⁶⁴ Further, these non-instrumental rules currently but not immutably emphasise individual human rights. Finally, the system currently recognises certain institutional forms, but this too is not immutable. Understanding the rule of law as an on-going relationship – in this case, a self-conscious sequence of attempting to perfect domestic rule of law in order to improve the international rule of law – does not require us to take this drastic step.

²⁶¹Nardin, above n10, at 399.

²⁶²Stromseth et al, above n27, pp81-3.

²⁶³Chesterman, above n7, at 360, reference omitted.

²⁶⁴Even this is currently under pressure from the globalisation of trade and commerce because it reorders states and private legal personalities such as corporations in the concept of justiciability, by allowing the latter to bring international actions against states: see The Hon Sir Anthony Mason, AC, KBE, ‘The rule of law and economic transactions’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p121), p128.

CHAPTER TWO:

THE GENERAL LEGISLATIVE COMPETENCE OF AN OCCUPANT AS TO THE DOMESTIC RULE OF LAW

One of the most recent examples of intervention in domestic judicial systems with a view to creating the rule of law, at least in part, began with the US-led occupation of Iraq in 2003-04.¹ Aside from the long-standing Israeli occupation of the West Bank and other Palestinian territories,² it was the first exercise of a belligerent occupation in many years where the occupant has been self-consciously so following invasion,³ and also attempted explicitly to create the 'rule of law' through domestic intervention in day to day judicial institutions.⁴ As the rule of law,

¹The occupation commenced with the securing of control over Iraq in May 2003 and concluded with the handover of legislative power to the Iraqi Interim Government on 28 June 2004, a period of approximately one year. The rule of law through representative democracy was one of the goals identified by the occupants to the UN Security Council: Letter dated 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538), p2.

²In this thesis, the "West Bank" encompasses the occupied area referred to in Israel as "Judea and Samaria," reflecting its historical antecedents and the rejection of the Jordanian claim of sovereignty: Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84 *AJIL* 44, at 59. It is important to note that the application of occupation law in the Israeli-administered areas of the West Bank and other Palestinian areas is disputed between an international majority, including the UN General Assembly, which consider that it applies as of law, and the State of Israel, which asserts that it applies only by Israeli consent, since it argues that the areas in question were never lawfully part of the Hashemite Kingdom of Jordan, therefore were never 'enemy territory' and were not 'occupied' in 1967: Justice Haim Cohen, 'Introduction', *The Rule of Law in the Areas Administered by Israel*, Israel National Section of the International Commission of Jurists, Tel Aviv, 1981, p.vii. For a summation of the Israeli argument regarding the applicability of occupation law in various territories under its control as of policy only, see further Roberts, *ibid*, at 61 et seq.

³In several other post-World War Two situations, the international community has decided that a de facto occupation has been in effect, including South Africa's presence in Namibia after the termination of its UN mandate in 1966: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 (Advisory Opinion of 21 June) (*Namibia Case*) and see further Roberts, *ibid*, at 49. Roberts traces the recognition of occupation by Turkey in northern Cyprus since 1974, Moroccan forces in Western Sahara in 1975, and Vietnamese forces in Kampuchea in 1978 by the General Assembly but not always consistently: at 50-1, and the references he cites.

⁴For example through the Central Criminal Court of Iraq, discussed further below. In other occupations, but particularly in Namibia, the international community through the UN General Assembly have indicated a desire for change to domestic structures to facilitate self-determination: *Namibia Case*; and see further Roberts, *ibid*, at 49. The ICJ in the *Namibia Case* considered that multilateral conventions "of a humanitarian character" would be binding on South Africa in its occupation, potentially much wider than occupation law: paras 96, 122.

properly understood, is a domestic relationship between subjects and their laws, and need not take any particular form, it is unsurprising that efforts to create the rule of law in Iraq, or better an Iraqi rule of law, have failed. There has been, however, some success in law and order reconstruction which focuses on certain practical and facilitative issues associated with preparing Iraq to participate in the ordinary provision of justice and thus in the international rule of law. This, it is argued, is the actual and intended focus of occupation law.

This chapter, preparatory to further analysis in the succeeding chapter of the specifics of judicial intervention during occupation, examines the general competence of the occupant to act in an occupied territory and the purposes for which international law confers that authority, particularly with respect to the rule of law and public order. These purposive provisions of occupation law act as significant limitations on the capacity of the occupant to effect permanent changes to domestic structures and law.

2.1 Belligerent and Non-Belligerent Occupation

The traditional academic distinction between a belligerent and a non-belligerent occupation, and the legislative competence that should arise from them, can be put aside since agreement on Article 6 of the 1949 *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (“Geneva IV”)⁵ which allows continued occupation after the cessation of hostilities, although in that case, “stringent measures against the civilian population will no longer be justified.”⁶ In all other respects, the same law of occupation applies regardless of the means by which the occupant came to be in control of part or all of the territory of another state.⁷ The asserted illegality of an occupation, for example following unlawful aggressive war, does not create a category of ‘illegal occupants,’ which attract no rights or powers.⁸

⁵12 August 1949, Geneva, 75 UNTS 287, entered into force 21 October 1950.

⁶The framers had in mind the post-war situation of Germany and Japan: Jean Pictet, *The Geneva Conventions of 1949: Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, pp62-3.

⁷Roberts has created a “far from exhaustive” list of seventeen kinds of occupation, all with a common law of occupation: above n2, at 51.

⁸Compare I.P. Trainin, ‘Questions of Guerrilla Warfare in the Law of War’ (translated from Russian by Dr John N. Hazard and reprinted) (1946) 40 *AJIL* 534; and see further Palestinian arguments

There is a variety of practice requiring states to apply occupation law regardless of the cause of their occupation. However, discussion as to whether different interpretations of occupation law ought to apply in the case of prolonged occupations, such as Israel in the Palestinian territories, permeates the discussion of the legislative competence of the occupant to re/construct a domestic rule of law.⁹

It has been recently argued strongly that occupation law should be applied in all circumstances of intervention, as an “international law regulating military presence in foreign territory.”¹⁰ Such a title obscures the limited jurisdictional scope of and the source of this body of law in the Geneva Conventions and its predecessors, the *Annexe to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land* (“Hague Regulations”) and the historical customs of war¹¹ - that is, the firm province of international humanitarian law. It also overlooks the extent to which an intervention under the authority of the UN Security Council may modify or adapt the position.¹²

summarised in Roberts, above n2, at 66, who thinks the suggestion “questionable” both on the facts of the Israeli situation but also the idea that a State may be bound by the obligations of a Convention but be unable to exercise rights granted by the same Convention. However, the assertion of a majority of Portuguese judges on the East Timorese Court of Appeal interpreting UNTAET Regulation 1 of 1999, the applicable law in East Timor was Portuguese law and not Indonesian law, since Indonesia had never lawfully been in occupation, caused significant difficulties there: *P v Armando do Santos*, p4, Court of Appeal, Case No: 16/PID.C.G./2001/PD.DL, 15 July 2003. The ruling was disputed in other decisions: see further Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, Springer, Berlin, 2005, p91.

⁹For example, Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *AJIL* 348, at 368. Feilchenfeld argues that for prolonged occupation, every field of law must come within the competence of the occupant: E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington, 1942, pp86-7. Compare Kelly, who takes a more pragmatic approach of arguing that the “administrative responsibilities and pressures must increase with the relative duration of the occupation: Michael Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*, Australian Government Publishing Service, Canberra, 1997, para 509. However, as the case of Iraq demonstrates, modern occupations will be controlled by the activity of the UN Security Council taking charge of situations threatening international peace and security under the aegis of Chapter VII of the *Charter of the United Nations*, 24 October 1945, San Francisco, 1 UNTS 41, entered into force 1 November 1945.

¹⁰Kelly, *ibid*, para 455.

¹¹*Annexe to Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land*, 18 October 1907, The Hague, (1908) 2 *AJIL* Supplement 90-117, entered into force 26 January 1910; Geneva IV and with it *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict*, 1125 UNTS 3 (“Additional Protocol I”) and *Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict*, 1125 UNTS 609 (“Additional Protocol II”), both adopted 8 June 1977, Geneva and entered into force 7 December 1978.

¹²This is taken up in Chapter Four, see 4.2 et seq.

2.2 The History and Sources of Occupation Law

The modern law of occupation begins with Article 43 of the Hague Regulations, representative of customary international law,¹³ which provides that

L'autorité du pouvoir legal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dependent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

It is significant that the authentic language of the Hague Regulations is French, as there are some divergences in English translation, rendered as

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country.¹⁴

Limitations on the competence of the occupant were explained in more detail in the framing of Geneva IV,¹⁵ whose key provision (Article 64) provides that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Article 64's emphasis on the criminal justice system reflects the negotiators' concerns about the conduct of previous occupations and their decision that there

¹³*Trial of the Major German War Criminals* (1946) CMD 6964, Misc No 12, at 65, affirmed in *US v von Leeb* ("The High Command Case") (1948) 11 TWC 10, at 462; *The King v Maung Hmin* [1946] Ann Dig, Case No 139 (High Court of Burma, 11 March 1946); *Taik v Ariff Moosejee Dooply and Anor* [1948] Ann Dig, Case No 191 (High Court of Burma, 23 June 1948) and *Austrian Treasury (Postal Administration) v Auer* [1947] Ann Dig, Case No 125 (Supreme Court First Division, Austria, 1 October 1947). Early disputes, for example, the finding of the International Military Tribunal for the Far East that the Hague Regulations were "good evidence of," but not necessarily exactly reflective of, custom (*In re Hirota* [1948] Ann Dig, Case No 118 (International Military Tribunal for the Far East, Tokyo, 12 November 1948), at 366) have been conclusively overruled for occupation law by the ICJ's view in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep (Advisory Opinion of 9 July), para 89.

¹⁴Adam Roberts and Richard Guelff (Eds), *Documents on the Laws of War*, 3rd Edn, Oxford University Press, Oxford, 2000, pp68, 81.

¹⁵Pictet, above n6, p335.

should be but two exceptions to the general principle of non-interference in, or continuity of, the domestic legal system: the occupant's security, as previously allowed by Article 43 of the Hague Regulations and which is explicitly included, and the "interests of the population which makes it possible to abrogate any discriminatory measures incompatible with humane requirements," in particular discriminatory measures contrary to the spirit of Geneva IV.¹⁶

Otherwise, the necessities of "the administration of justice" govern intervention for the three identified purposes only: again security, "orderly government" and the protection of the occupant's facilities, which also tie directly to security. Pictet considered all other interference in the penal system, "in particular, merely to make it accord with [the occupant's] own legal conceptions" prohibited, unless domestic judicial officials refuse to continue in office, as permitted by Article 56 of Geneva IV. In that case expedient intervention in the creation of courts or appointment of judges would be permitted.¹⁷

2.2.1 *The General Legislative Competence of the Occupant*

Neither Geneva IV nor the Hague Regulations employ the term 'sovereignty' for the powers granted to an occupant, which one would expect if the grant of administrative, legislative and judicial power were complete. The "authority of the legitimate power" posited by Article 43 of the Hague Regulations and the three grounds of legislative competence in Article 64, Geneva IV, are less than the "sovereignty" of the original State. That is a natural consequence of the law of occupation being a temporary solution to the determination of the locus of sovereignty, which would revert to the original State (the reversioner), pass permanently to the occupant in case of cession¹⁸ or invest in a new, self-

¹⁶Ibid, p335. The term "penal laws" was intended to include all substantive and procedural laws and regulations applying in the occupied area. See also Edi Gnesa, *Die von Israel besetzten Gebiete im Völkerrecht: Eine besetzungsrechtliche Analyse*, Schweizer Studien zum Internationalen Recht Band 25, Zürich, 1981, p142.

¹⁷Pictet, *ibid*, p336.

¹⁸The traditional view that the occupied territory may pass to the occupant in the case of *debellatio*, "a complete collapse of the enemy coupled with subjugation, exercised through annexation" must now be dismissed, with the characterisation of annexation of land by conquest as unlawful. What is left is cession by treaty. See, for example, Allan Gerson, 'Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14 *Harv Intl LJ* 1, at 6. Gerson also argues that sovereignty may pass peacefully by "prescription, a state of occupation which is continuous, uninterrupted, and peaceful, provided that all other interested and affected parties have acquiesced in this exercise of authorities." Historically, sovereignty was not thought to transfer until the conclusion of hostilities:

determinative State on resolution of the conflict or non-belligerent dispute giving rise to the occupation. However, the legitimacy of at least some legislation on the part of the occupant means that the reversioner “must not abrogate at will” that legislation, for example, by purportedly retroactive blanket declaration, although it may rescind retroactively particular regulations in the exercise of its sovereign authority.¹⁹

While occupation law both confers powers and limits them, the overall effect of the Hague Regulations and Geneva IV is proscriptive. The Article 64 grant to “maintain the orderly government of the territory” would be extensive but for limitations imposed by succeeding clauses which prohibit retro-active “penal provisions;” allow the establishment of “properly constituted, non-political military courts” (but which are not to be special courts) applying the provisions of law applicable “prior to the offence;” limit the death penalty for security offences; and prohibit prosecution “by the Occupying Power” for acts committed before the occupation.²⁰ Article 47 of Geneva IV additionally provides that civilians in the occupied territory “shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present convention by any change introduced, as the result of the occupation of the territory, into the institutions or government of the said territory.”

It has been argued that the limitations on the occupant’s powers are in the nature of a trust or usufruct.²¹ Both views are problematic. Trusteeship as an ordinary principle of common law is the non-beneficial holding of complete authority for the benefit of another,²² and is inconsistent with occupation,²² in which the occupant usually asserts a claim of sovereignty on its own part or on the part of a body other than the sovereign but is unable to exercise sovereignty of any kind until the status of

Hugo Grotius, *de Jure Belli ac Pacis Libri Tres*, 1625 (translated Francis W. Kelsey, Clarendon Press, Oxford, 1925), Book 3, Chapter VIII.1.3; Davis Goodman, ‘The Need for Fundamental Change in the Law of Belligerent Occupation’ (1984-5) 37 *Stan LR* 1573, at 1576.

¹⁹Felice Morgenstern, ‘Validity of the Acts of the Belligerent Occupant’ (1951) 28 *BYBIL* 291, at 298, finding a “remarkable agreement” among commentators but little state practice.

²⁰Articles 65, 66, 68 and 70 respectively; see further Pictet, above n6, pp340-1.

²¹Roberts argues that “some idea of ‘trusteeship’ is implicit in occupation law anyway,” for example in economic rules in the Hague Regulations (Article 48-56): above n2, at 68; Gerson advocates a complete trust-based view of occupation, above n18, while Kelly and von Glahn prefer usufruct: Kelly, above n9, para 509; Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp31-7.

²²See, for example, P.H. Pettit, *Equity and the Law of Trusts*, 8th Edn, Butterworths, London, 1997, p24, noting that the beneficiaries of the trust may include the trustee or a charitable purpose. Gerson applies a similar concept to the law of occupation, above n18.

the occupied territory is finally resolved. Further, even where occupation law is attempted to be applied to UN mandated interventions,²³ sovereignty in the subject territory is “in abeyance” until the people are recognised as “an independent state [where] ... sovereignty will revive and vest in the new state.”²⁴

Characterising the powers of the occupant as those of a usufructuary is also a broad claim, since rights of usufruct encompass rights to exploit.²⁵ Certain usufructuary rights are explicitly conferred by Article 55, Hague Regulations for the lease or use of public buildings and lands,²⁶ and national natural resources, a typical property-based right. This specific inclusion, however, tends to suggest that the excluded reference to usufruct in other senses is indicative of their lack of application. Further, the rights conferred allow the occupant to make use of certain resources for the purpose of its occupation, that is, as an administrator of the territory, but not for unconditional self-enrichment.

The better view is that there is limited, temporary and purposive grant of legislative authority which relies on the preservation of key aspects of the status quo ante pending resolution of sovereignty. It is truly a ‘de facto’ transfer rather than a legal transfer of administrative power.²⁷ This accords with the specific construction of the Hague Regulations and Geneva IV. Article 68 of Geneva IV, for example, makes clear that the occupant does not exercise sovereignty because it prohibits the occupant from imposing certain death penalties;²⁸ while Article 47 “demonstrates the intention of the parties that the municipal courts in the occupied country – and, moreover, the occupant’s own courts, shall protect certain rights of the inhabitants which are guaranteed to them by that Convention, and shall treat as unenforceable laws of the occupant which violate these rights.”²⁹

²³On which, see further Chapter Four, below.

²⁴*International Status of South West Africa* [1950] ICJ Rep 128 (Advisory Opinion of 11 July), per Lord McNair at 50; *Namibia Case*, above n3, at 28-9; Gerson, above n18, at 26 et seq.

²⁵L.F.E. Goldie, ‘Title and Use (and Usufruct) – An Ancient Distinction Too Oft Forgotten’ (1985) 79 *AJIL* 689, at 693.

²⁶Feilchenfeld, above n9, at 55. Article 55 provides that “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

²⁷Israeli National Section of the International Commission of Jurists, above n2, p1.

²⁸See further Morgenstern, above n19, at 302.

²⁹*Ibid*, at 304.

In practice, the grant of competence to the occupant is greater than the limitations imposed by occupation law in one significant respect. Occupation authorities assert a competence to determine which law is in force in the occupied area at the moment of occupation, thereby self-defining limits on their capacity to intervene. This is not an area of competence explicitly recognised in Article 64, Geneva IV, or in the Hague Regulations. On occasion this has caused dispute with the domestic legal community, for example Palestinian lawyers have argued that the law in force declared by the Israeli administration was not in fact the law in force at the time of occupation, but have been unable to persuade Israeli military courts that there is a right of review of the declaration.³⁰

2.2.2 *Rejecting the Full Transfer of Domestic Legislative Competence*

The Israeli National Section of the International Commission of Jurists, comprising mainly legal officers in the Israeli Armed Forces Reserve, argues that “l’*autorité du pouvoir legal*” in Article 43 is broader than its rendition as “the authority of the power of the State,” meaning rather “all the powers deriving from the local law of the occupied territory.”³¹ What the distinction appears to suggest is a subtle difference between what international law identifies as rights and law-making powers attributable to a sovereign State, only some of which are conferred on the occupant, and powers that might already be invested in the government under the domestic law of the occupied State, all of which are said to be conferred on the occupant because it stands as *de facto* administrator in the shoes of its predecessor. It

³⁰*Israel Defence Forces Proclamation 2/1967* preserved the extant law which did not conflict with proclamations or “to the changes resulting from the establishment of the rule” of the Israeli Defence Force, clarified to be the British *Defence Emergency Regulations* of 1945: see further Gerson, above n18, at 13. However, Palestinian lawyers argued that the *Regulations* were considered repealed in 1950 and replaced by the Jordanian *Criminal Code 1951*. A submission to this effect before a military court was rejected and the matter supposedly clarified with the issue of another executive order from the occupying administration that the *Regulations* were to be considered the law in force: Raja Shehadeh and Jonathan Kuttab, *The West Bank and the Rule of Law*, The International Commission of Jurists, Geneva, 1980, p24, citing Article 2, Order 224. For the Israeli view, see Israeli National Section of the International Commission of Jurists, above n2, p67.

³¹Israeli National Section of the International Commission of Jurists, *ibid*, p2. Schwarzenberger agrees that the French has been “freely, if hardly accurately” rendered: G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol II: The Law of Armed Conflict, Stevens and Sons, London, 1968, p180.

would permit the exercise of domestic authorities for the occupant's own benefit, for example, the authority to expropriate land.³²

The Israeli argument would necessarily preclude powers to amend or alter laws, for whatever motive, which did not exist domestically, for example in the case of a constitutional prohibition on the establishment of special or ad hoc courts or the conferral of judicial power on bodies not recognised as courts.³³ This would contradict the express authorisation in Geneva IV for the occupant to establish military courts administering security offences in the territory, as well as the requirement to observe local laws as in force "unless absolutely prevented." Further, the view presupposes the full passage of the sovereign's domestic authority, yet custom is firm that sovereignty does not pass to the occupant. The de facto passage of administrative powers,³⁴ recognised internationally, does not reach the same point as the Israeli argument seems to assert.

In Iraq, the Coalition Provisional Authority's *Regulation 1*, specifically drawing on "relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war" in its prefatory recitations, claimed temporary "powers of government ... in order to provide for the effective administration of Iraq."³⁵ There is nothing surprising nor inconsistent with occupation law in this pronouncement. The ambit assertion of powers also included "all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war."³⁶ Nor is this colourable, except to the extent that it does not elaborate the limitations on the exercise of such powers which are the chief concern of the Hague Regulations and Geneva IV.

³²See for example Yaron Butovsky, 'Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank' (1983) 21 *Can YBIL* 217, at 233, discussing land requisitions for Israeli settlements in the occupied West Bank.

³³For example, the Australian constitution provides that the "judicial power of the Commonwealth" is to be exercised only by courts established in accordance with Chapter III, a requirement producing a history of confusion regarding the status of disciplinary tribunals for the Australian Defence Force, most recently in *Lane v Morrison* [2009] HCA 29 (26 August 2009).

³⁴Butovsky, above n32, at 218. There is some dispute in Israeli jurisprudence about whether the Orders of the military government of the occupied areas are 'law' or executive acts, arising from a domestic issue of justiciability, however Article 64 at least is clear that the occupant may 'repeal or suspend' penal laws, and must therefore have a legislative competence, however limited. The central Israeli case is *Hilu v Government of Israel* (1973) Vol 27, Part 2 *Piskei Din*, summarised in English in (1975) 5 *Isr YBHR* 384.

³⁵Section 1(1), *Coalition Provisional Authority ("CPA") Regulation 1* (16 May 2003).

³⁶Section 1(2), *CPA Regulation 1*.

2.3 Purposive Limitations on the Competence of the Occupant

Geneva IV, against the background of the Hague Regulations, specifies the purposive limitations that define the legislative competence of the occupant. They have been held to mean that institutional change in an occupied territory is to originate in a “concern for security and public safety.”³⁷ The primary boundaries are the subject matter requirements of the occupant’s security and the minimum required for the “administration of justice,” which both draw on the specific terms of Article 64; and the background necessity of “*l’ordre publique*” and the observation of existing law “unless absolutely prevented,” which together with the obligation to “restore” *l’ordre publique* call strongly to the status quo ante, contrary to a more modern mood of humanitarian intervention to change domestic legal structures.

2.3.1 Competence Regarding the Occupant’s Security

Both Hague and Geneva law explicitly refer to security as a ground for legislative competence, but whether it is an enabler or a limit is arguable in some respects. The breadth of ‘security’ has been traditionally subjected to a test of military necessity, where the need to observe local law “unless absolutely prevented” meant amendments to domestic law would be permitted where required by the necessities of war or for the maintenance of public order.³⁸ The legislative competence conferred by Article 64 of Geneva IV supports this view by permitting provisions to “maintain the ‘orderly government of the territory’ in its capacity as the power responsible for public law and order” and enact “penal provisions for its own protection.”³⁹

The practical problem of a necessity-based view of occupation law is that practice has traditionally oscillated around a domestic right of review for specific measures said to be required by security. Often, no right of judicial review where the measure is *prima facie* necessary has been upheld, although review may be exercised

³⁷*V v O* [1947] Ann Dig, Case No 121 (Court of First Instance, Corfu, 163/1947), where the court found that Article 43 only allowed changes to the extant law for the safety of the occupying force; Butovsky, above n32, at 222.

³⁸*Milinaire v Germany* (1923) 2 MAT 715; *Ville d’Anvers v Germany* (1925) 5 MAT 716, both decisions of the Mixed Arbitral Tribunal, see Kelly, above n9, para 512. More recently, an order regarding a property dispute which had no impact on military considerations was rescinded in *Sabu v Military Governor of Jaffa* [1949] Ann Dig, Case No 166 (High Court of Justice, Israel, 6 September 1949).

³⁹Pictet, above n6, p337.

over regulations patently beyond the scope of the occupant's authority.⁴⁰ Cases arising from German and Allied occupations during World War Two in particular took this view; only in some cases, and only *obiter*, did judges consider that the right of review might apply in all cases.⁴¹ Although Israel has attempted to overcome this difficulty for the rule of law by permitting access to its own courts for review,⁴² this is not required and is not a widespread measure. Further, after cessation of the occupation, regulations found invalid nonetheless have led in some cases to the accrual of individual rights and binding administrative decisions during the period of their supposed validity.⁴³ This must be a consequence of the formalist quest for certainty in the rule of law.

Where measures are *prima facie* related to the occupant's security, the population is obliged to obey them just as they are obliged to continue to observe the municipal laws of their state, including those modified by the occupant.⁴⁴ This too

⁴⁰Overturing a decision of the Court of First Instance in Hebron that the Military Commander could not make an order allowing Israeli lawyers to appear before West Bank courts, the Ramallah Court of Appeal decided that "the occupying power is the proper authority to decide whether or not there exists a necessity to make any amendment or addition to the laws in force in the occupied region": *Muhammad Amin al-Ja'bari v Ahman Ya'qub 'Abd al-Karim al-Awiwi* (1968) 42 Intl L Rep 484 (Court of Appeal, Ramallah, 17 June 1968). See further Morgenstern, above n19, at 306, 320 and the references he canvasses; and Butovsky, above n32, at 227.

⁴¹The Dutch Supreme Court found the legality of legislative acts non-justiciable in *In re Jurisdiction of the Dutch Supreme Court for Economic Matters* [1919-42] Ann Dig Supplementary Volume, Case No 161 (Supreme Court, Netherlands, 12 January 1942), and the Dutch government suspended members of the Court on its return to authority. A general right of review was asserted in *Re Contractor Knols* [1946] Ann Dig, Case No 144 (Special Court of Cassation, Holland). There is supportive Norwegian authority for the proposition in *Øverland's Case* [1943-5] Ann Dig, Case No 156 (District Court of Aker, 25 August 1943) but ultimately the court found it unnecessary to pronounce on a general right of judicial review since the impugned allodial laws were "obviously in contradiction" to Article 43; instead, the court said that the occupant must show a compelling reason to set aside domestic law, and may not do so where the purpose can be achieved by another means. The Greek Court of Cassation put aside the judgment of a German military court on the basis that the laws of Greece had not been respected as required by Article 43: *In re S* [1943-5] Ann Dig, Case No 150 (Court of Cassation, Greece, 255/1944), as did the Reichsgericht, setting aside US regulations affecting legal relations between citizens in the Rhineland because they were outside the scope of Article 43: *Armistice Agreement (Coblenz) Case* [1919-22] Ann Dig, Case No 305 (Reichsgericht in Civil Matters, 10 April 1921).

⁴²Butovsky, above n 32, at 219.

⁴³*Kloet v Klok* (1947) Nederlandse Jurisprudentie, No 38 (Supreme Court of Holland), in the case of an ordinance declared invalid on reversion. See further Morgenstern, above n19, at 313, and the similar cases of the same period he discusses. Compare instances where commentators and courts have refused to enforce acts of the occupant which are prohibited under the Hague Regulations: Morgenstern, *ibid*, at 320; Butovsky, *ibid*, at 227; *Muhammad Amin al-Ja'bari v Ahman Ya'qub 'Abd al-Karim al-Awiwi* (1968) 42 Intl L Rep 484 (Court of Appeal, Ramallah, 17 June 1968).

⁴⁴One point of view casts these as separate duties arising from international and municipal law respectively' although this view is not popular and most commentators see no distinction: Major Richard B. Baxter, 'The Duty of Obedience to the Belligerent Occupant' (1950) 27 *BYBIL* 235, at 239-41 and the literature he reviews. Oppenheim, however, sees the inhabitant's duty as to his own laws, which supports an indirect only duty of obedience to the occupant: L. Oppenheim, 'The Legal

provides a level of certainty for the inhabitants, favoured by rule of law formalists.⁴⁵ However, national judicial practice reserved the right to resist the occupation in the aftermath of World War Two,⁴⁶ and concluded that the authority given to the occupant in Article 43 to legislate was not matched by an equivalent compulsion on individuals, and so the political charge of collaboration could be met with a defence only of *force majeure* – the purpose of Article 43, said the Dutch Court of Cassation, was to limit the activity of the sovereign not to control the conscience of the occupied.⁴⁷ However, the Special Criminal Court of The Hague found in a separate case that where Article 43 powers were exercised “exclusively” for the benefit of the subjects of the occupation, obligations might be created.⁴⁸

2.3.2 Competence to Facilitate the “Administration of Justice”

Aside from its assertions of legislative competence to intervene in domestic systems on humanitarian grounds, Article 64 specifically provides that domestic tribunals are to be free from interference unless necessary for the application of Geneva IV provisions or the “administration of justice.” The latter term is not defined in Article 64 itself. Other provisions regarding the administration of penal laws suggest a limited, pragmatic competence on the part of the occupant to intervene, outside matters directly affecting their own security (for which they are permitted to establish military courts).

Relations between an Occupying Power and the Inhabitants’ (1917) 33 *LQR* 366. Along with concepts such as war treason and war rebellion, Baxter concludes that the Geneva Conventions replace the need for any notion of a duty of obedience to the occupant, at 266, but there is some value remaining in the idea to the extent that it illuminates the validity of the occupant’s interference in the domestic legal system, beyond his security needs.

⁴⁵Baxter, *ibid*, at 264.

⁴⁶For example, *In re Rauter* [1948] Ann Dig, Case No 131 (Special Court (War Criminals), Holland, 4 May 1948); *In re Bruns et al* [1946] Ann Dig, Case No 167 (Eidsivating Lagmannsrett (Court of Appeal), Norway, 20 March 1946), which found that international law had not been violated by the resistance, although it may have violated certain provisions of local law under the occupant; *In re Flesch* (1946-8) 4 War Crimes Reports 115 (Frostating Lagmannsrett, Norway, 12 February 1948); and *In re List et al (Hostages Case)* (1948) 8 War Crimes Reports 34, where the US Military Tribunal allowed that armed resistance may permit the occupation authorities to impose a penalty on fighters as war criminals, although Baxter allows that its decision is more in terms of a “punishment *permitted* by international law than it is of a punishment *imposed* by international law.” See Baxter, *ibid*, at 256-7, emphasis original; and Morgenstern, above n19, at 293-4.

⁴⁷*In re Contractor Worp* [1946] Ann Dig, Case No 145 (Special Court of Cassation, Netherlands, 15 July 1946); *In re van Huis* [1946] Ann Dig, Case No 143 (Special Criminal Court, The Hague, 15 November 1946); Baxter, *ibid*, at 257.

⁴⁸*In re van Huis*, *ibid*; Baxter, *ibid*.

Geneva IV provides certain requirements regarding the administration of penal laws. Article 71 precludes sentencing except “after a regular trial,” which has been said to import a “fundamental notion of justice as it is understood in all civilised nations,” including rules such as the presumption of innocence, which are not included in Geneva IV but are logically consistent with its approach.⁴⁹ Article 147 includes among grave breaches of the Convention depriving protected persons of the “rights of fair and regular trial prescribed in the present Convention” and Article 3 prohibits the death penalty without “the judicial guarantees which are recognised as indispensable by civilised peoples.” In regards to Article 147, Pictet comments that the “supervision exercised over the administration of justice in all countries makes it difficult to conceive” of the occurrence of such a breach of Geneva IV, instead it would be a breach of the specific requirements of the Convention, for example trial by an exceptional court.⁵⁰ Article 3, on the other hand, prohibits ‘summary justice,’ since “all civilised nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war.”⁵¹

In summary, Geneva IV requires regularity in criminal justice proceedings, based on a notion of justice commonly understood amongst civilised peoples. International documents which attempt to distil such principles, however, have been criticised as not contemplating circumstances of occupation and therefore not being binding,⁵² but they shed light on the international communal understanding of terms.

⁴⁹Pictet, above n6, p353-4.

⁵⁰Ibid, p600.

⁵¹Ibid, p39. There is judicial support in the decision of the Military Court of Bethlehem, which reserved only the right to question orders which are “on the face of it so unreasonable and extraordinary, [are] so contrary to the principles of natural justice and international morality common to civilised peoples that it is intolerable and the Military Court must ignore it by virtue of its inherent powers, because it was enacted on the basis of considerations deriving from malice and arbitrariness and not in order to achieve a lawful purpose.” *Military Prosecutor v Zuhadi Salah Hassin Zuhad* (1968) 47 Intl L Rep 490 (Israeli Military Court, Bethlehem, 11 August 1968). The case concerned a traffic matter.

⁵²Kelly discusses the *Basic Principles on the Independence of the Judiciary* (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August-6 September 1985, Milan, endorsed by UN General Assembly resolutions 40/32 (1985) and 40/146 (1985)) and the *Code of Conduct for Law Enforcement Officials* (adopted by General Assembly Resolution 34/169 (1979)), finding that they “clearly have no binding application to occupation situations. In the first instance they do not express an application to occupied territory or a modifying status in relation to the existing provisions of the law of occupation. Secondly, they are clearly aimed at indigenous justice administrations and not those instituted by foreign forces.” Thirdly, they have a minor legal character as they emanate from the General Assembly only: Kelly, above n9, para 619.

2.3.3 Restoring “l’ordre et la vie publique”

The Hague Regulations originally required the occupant to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety” (*l’ordre et la vie publiques*). The interpretation of the last phrase has been subject to dispute. There are no *travaux préparatoires* which could assist from the 1907 or 1899 Hague Conferences, although a comment related to the 1874 Brussels Code interpreted it as “*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours.*”⁵³ Those who espouse a broader view of the competence of the occupant trace it to the authentic French of the Hague Regulations, arguing that *la vie publique* is more than the English “public order and safety” and has the same meaning as the Brussels Code.⁵⁴ National courts have made a purpose of “public order and safety” a precondition to enforcing private rights arising from the legislation of the occupant,⁵⁵ using it in a ‘law and order’ sense.

There is some evidence to be derived from the Hague Regulations and from Geneva IV, exempting certain kinds of laws from change and protecting some fields from interference at all, which suggest that the emphasis must be firmly on the restoration of the capacity to engage in daily transactions, rather than regulating the transactions themselves except as required for the security and maintenance of the occupying forces. For example, cultural safeguards for health and hygiene measures are set out in Article 27 and 46 of the Hague Regulations, as well as in Articles 27 and 56, Geneva IV. This would trump any assertion of a right to legislate for culturally inappropriate maintenance or ‘improvements’ to these institutions of public life.

It is, however, international human rights law which is of greatest interpretative assistance. It assists in two ways, firstly by elaborating the content of

⁵³Article 2, *Actes de la Conférence Réuni à Bruxelles, du 27 Juillet au 27 Août 1874, pour Régler les Lois et Coutumes de la Guerre, Nouveau Recueil Générale de Traités*, 2nd Series, 1879-1880.

⁵⁴E.H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43, Hague Regulations,’ (1945) 54 *Yale LJ* 393, at 398. See also Israeli National Section of the International Commission of Jurists, above n2, p6; J. Westlake, *International Law*, Vol II: War, 1913, p95. Israel, for example, sees it incumbent upon the occupier to “restore and maintain public order and normal everyday life while respecting the provisions of local Jordanian law: Israeli National Section of the International Commission of Jurists, *ibid*, p1.

⁵⁵*V v O* [1947] Ann Dig, Case No 121 (Court of First Instance, Corfu, 163/1947); *Ko Maung Tin v U Gon Man* [1947] Ann Dig, Case No 104 (High Court (Appellate Civil), Burma, 3 May 1947); Morgenstern, above n19, at 305.

occupation law itself, for example, common Article 3(1)(d) in Geneva IV with its reference to “the judicial guarantees which are recognised as indispensable by civilised peoples,” and secondly, in its direct applicability to the interstices of the humanitarian law regime. As to the latter, the *International Covenant on Civil and Political Rights* (“ICCPR”), for example, applies in time of war, subject to derogation,⁵⁶ and “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”⁵⁷ Other treaties, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (“ECHR”) may apply extra-territorially, imposing internal obligations on the occupant to accord such rights to persons under their effective control.⁵⁸

Human rights law, although permitting derogation of, inter alia, rights to a fair trial in case of national emergency, in which security is threatened,⁵⁹ is argued by blueprint theorists of the rule of law to be applicable in its non-emergency form in circumstances in which Geneva IV would apply.⁶⁰ This approach aligns with the minimum standard of trial which has been elaborated in some detail in international recommendations,⁶¹ and which forms the basis of substantive rule of law theories.⁶²

⁵⁶Adopted by General Assembly Resolution 2200 (1966), A/RES/2200A XXI, 999 UNTS 171, entered into force 23 March 1976; *Legality of the Threat or Use of Nuclear Weapons* (1996) 1 ICJ Rep 239 (Advisory Opinion of 8 July), para 24.

⁵⁷*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n13, para 111.

⁵⁸This was established for the European Convention on Human Rights in, for example, *Cyprus v Turkey* (1975) ECtHR 6780/74 and 6950/75 and *Stocké v Germany* (1989) ECtHR 11755/85 (both recognised applicability to persons under “actual authority”); *Loizidou v Turkey* (1996) ECtHR 15318/89 expanded it to persons under “effective control” but this was wound back in *Bankovic v Belgium* (Admissibility Decision) (2001) ECtHR 52207/99 to require a jurisdictional link outside the ‘juridical space’ of the State party. This could well include military occupation – for a more detailed analysis, see section 3.5.2, Chapter Three below.

⁵⁹Section 1.3, Chapter One above.

⁶⁰Including Rachel Kleinfeld, ‘Competing Definitions of the Rule of Law,’ in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006, pp31-73; Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006.

⁶¹For example, Principle 70, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984) (“*Siracusa Principles*”). Those minimum standards concerned certainty of law, presumption of innocence, arrest and accusation, detention pending trial, preparation and conduct of defence, minimum duties of the prosecution, examination of the accused, trial in public, retrial (double jeopardy), legal remedies including appeals, and punishment: Clauses 1-11, *Report of Committee III* (International Congress of Jurists), New Delhi, 5-10 January 1959, reproduced in Norman S. Marsh (Ed), *The Rule of Law in a Free Society: A Report on the International Congress of Jurists*, New Delhi, India, 1959, International Commission of Jurists, Geneva, 1959, pp8-11. It should be noted

Similarly, Committee III of the International Congress of Jurists considered that, within certain “minimum [standards] necessary to ensure the observance of the Rule of Law,” each state should develop its “own system of law.”⁶³

The Human Rights Commission has stated that Article 14 of the ICCPR applies to both civil and criminal suits and its requirements are “aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights.”⁶⁴ The Commission clarified that, while special or military courts are often intended “to enable exceptional procedures to be applied which do not comply with normal standards of justice,” they were not prohibited by Article 14. However, the conditions of Article 14 mean that the use of such courts should be “very exceptional” and include the full range of protections. This is to be compared with Geneva and Hague law, which are both directly concerned with security’s impact on the administration of justice and confer a general and explicit authority to establish occupation courts for security purposes.

Interestingly, the Israeli National Section appears to argue that *la vie publique*, whose restoration is the object of the occupant’s powers, is not consonant with international human rights law. For example, they suggest that prohibiting strike action against the occupant would safeguard *la vie publique*,⁶⁵ although the right to strike is included, as a derogable right, in the ICCPR.⁶⁶ To take action based on security would have to match the occupant’s legal ability to derogate from human rights obligations.

Finally, there is dispute about the level of obligation imposed on the occupant to deal with *l’ordre et la vie publique*. The overarching competence given to the

that some of these standards are explicitly considered derogable even in times not of national emergency, including the right to a public trial: Article 14(1), ICCPR.

⁶²See Chapter One above, especially 1.1.2 et seq.

⁶³International Congress of Jurists, *Report of Committee III*, New Delhi, 5-10 January 1959, reproduced in Marsh, above n61, p8.

⁶⁴Human Rights Committee, *General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), paragraphs 1-2.

⁶⁵Israeli National Section of the International Commission of Jurists, above n2, p79.

⁶⁶Article 22(1) provides that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Interpreting the same phrase in Article 11, *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted by the Council of Europe, 4 November 1950, Rome, 213 UNTS 221, entered into force 3 September 1953), the European Court of Human Rights held that the right to strike was internationally recognised: *Enerji Yapi-Yol Sen v Turkey* (2009) ECtHR 68959/01.

occupant to protect his own security through legislative measures, and the imposition of a test of military necessity, suggests that intervention in *la vie publique* is subject to security requirements. Dinstein argues alone that even where the occupying forces are not directly affected by disorder, they are obliged to create and maintain “law and order,” and must not permit a chaotic or lawless environment to continue in the occupied area.⁶⁷ Kelly prefers a permissive environment, although he acknowledges the practical imperative of restoring order to minimise the operational impost of the occupation.⁶⁸

The words of Article 43 are mandatory, but the level of obligation they impose is subjective, especially given the general non-justiciability of measures: the occupant “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety.” Article 64, Geneva IV, is less mandatory again, providing that penal laws and courts “shall” continue in force, but the occupant “may” intervene in certain circumstances. However, Dinstein is taking into account human rights law in his analysis, and therefore the extraterritorial obligations of the occupant may significantly affect his obligation to intervene in *la vie publique*, not as a matter of occupation law but as a broader international obligation. This is complicated by the emphasis in occupation law on the *restoration* of *la vie publique*, and a traditional emphasis on the status quo ante as opposed to intervention however well-intentioned, to change the legal system of the occupied territory.

2.3.4 *Restoring the Status Quo Ante vs Humanitarian Intervention*

Article 43 is particular in its use of the word “restore” *l'ordre et la vie publique*. On its face, this seems a clear imperative that the authority of the occupant extends only so far as the restoration of the civil and judicial institutions which existed before the particular conflict: the status quo ante. That is the ordinary meaning of the word,⁶⁹ and it accords with the view that sovereignty remains with the reversioner⁷⁰ or in abeyance pending self-determination. The 1899 predecessor of

⁶⁷Yoram Dinstein, ‘The International Law of Belligerent Occupation and Human Rights’ (1978) 8 *Isr YBHR* 104, at 111.

⁶⁸Article 43 simply requires the occupant to “allow the local population, as far as possible and with due consideration to force security, to resume normal life: Kelly, above n9, para 506.

⁶⁹Article 31(1), *Convention on the Law of Treaties*, adopted 22 May 1969, Vienna, 1155 UNTS 331, entered into force 27 January 1980.

⁷⁰Butovsky, above n32, at 218.

Article 43 used “re-establish,” placing a stronger emphasis on the previous social organisation, and suggesting that the 1907 version was deliberately more generous as to how the occupant might achieve order, while remaining concerned with the pre-occupation state of affairs.⁷¹ In the context where the reversioner cannot abrogate wholesale occupation regulations made lawfully, it is important to ensure that any *fait accompli* is prevented.⁷²

Prolonged occupations, particularly Israel’s areas of occupation, raise the difficulty of the strict status quo ante approach. A lengthy occupation may cover a period of intense change in expectation and aspirations domestically and internationally, and unwittingly oblige the occupant to leave the occupied society deliberately underdeveloped.⁷³ Self-determination rather than a return to pre-occupation rule, as the international community demanded in Cambodia, Namibia and Western Sahara,⁷⁴ is the essential contradiction to too strict a view of Article 43. Further, where anarchy preceded the conflict, or there was some other flaw in the administrative system affecting civil life, some have argued that the *obligation* on the occupant to act is even further reduced, because there is nought to restore.⁷⁵

The emergence of Article 64, with its more permissive scope, means occupation law is better placed to resolve the problem. It would authorise a variety of activities to certain purposes, including meeting rights-based obligations under Geneva IV and the specific authority to intervene where necessary for orderly government and the administration of justice. This could alter, perhaps irretrievably, the status quo ante if taken at its widest. An early proponent of this view phrased it as a duty to govern “to the greatest possible extent for the good of the native

⁷¹Goodman, above n18, at 1578.

⁷²Gerson, above n18, at 39; Roberts agrees on the need to prevent “disruptive changes” ahead of the reversioner’s return, or, where there is no reversioner, “to inhibit any unilateral, drastic and permanent changes in the political, economic, social and legal orders:” above n2, at 46.

⁷³Roberts, *ibid*, at 52. To resolve this problem, Falk has proposed the negotiation of a separate treaty on prolonged occupations, but it has not yet eventuated: Richard Falk, ‘Some Legal Reflections on Prolonged Israeli occupation of Gaza and the West Bank’ (1989) 2 *J Refugee Stud* 40.

⁷⁴Roberts, above n2, at 75-6.

⁷⁵Kelly, above n9, para 508; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton (NJ), 1993, p11; Gerson also allows a wider scope to act in a non-belligerent occupation, for example in a trusteeship or a *res nullius*, because the status quo ante “would no longer be relevant” absent a reversionary interest: above n18, at 40.

inhabitants.”⁷⁶ Thus, the Israeli High Court of Justice has found that an altruistic motivation in passing impugned legislation, such as amending arbitration provisions in domestic labour law, can support it.⁷⁷ The problem with assessing this by reference to measures in force in the home state of the occupant, as Cohn J considered important, is that implementing equal legislative treatment in both territories is effectively an unlawful integration of the occupied area into the home state, and may also separate the occupied area in legal structure from other countries with which it has a cultural or legal affiliation.⁷⁸

There is a particular line of Israeli authority, inconsistent with the ‘may’ wording of Article 64, which goes further and mandates this kind of humanitarian intervention to enhance infrastructure and ensure the provision of essential services to a higher standard or to localities where it was previously available, for example electricity supply, to ensure the development of normal life of the occupied society.⁷⁹ In that case the occupation had already persisted for eight years, and this appears to have influenced the decision. Given the clear wording of Article 64, this view must be set aside.

The other main authority for intervention to advance the legal system consciously beyond the pre-occupation state of affairs is the Allied suspension, de-Nazification and reorganisation of German institutions, including the judiciary, from

⁷⁶Von Glahn, above n21, pp34 and 224-9. Kelly also considers that activity “to promote the conditions of the population” would be permissible, though not obligatory: Kelly, above n9, para 508. See also Schwarzenberger, above n31, p128 et seq.

⁷⁷*The Christian Society for the Holy Places v The Minister of Defence* (1972) 52 Intl L Rep 512 (High Court of Justice, Israel, 14 March 1972). However, in his dissenting opinion, Cohn J found that Article 43 did not allow “the occupant ... to impose in the territory ideal public order and civil life ... his powers are to restore that public order and civil life which prevailed there previously, and to ensure their future maintenance,” at 520. For Cohn J, this was especially so where Israeli law did not reflect the change the military administration sought to introduce. However, the majority thought that an imperative need allowing legislative intervention could include the welfare of the occupied people as well as the security of the occupant: for example, at 514 per Deputy President Sussman. See further Gerson, above n18, at 13, pointing out that the majority decision appeared pragmatic rather than based on the text and case law surrounding Article 43. An amnesty said to be for the occupant’s benefit alone was characterised as outside the occupant’s Article 43 competence in *Re A* [1943-5] Ann Dig, Case No 162 (Criminal Court of Heraklion, Greece, 106/1945).

⁷⁸Roberts, above n2, at 94, discussing the *Abu Aita Case* (1983), translated in (1988) 7 *Selected Judgments of the Supreme Court of Israel* 6.

⁷⁹The High Court of Justice explicitly rejected a submission that such an obligation was contrary to the Hague Regulations: *Electrical Corporation for Jerusalem District Ltd v Minister for Defence* (1975) 5 *Isr YBHR* 381, at 383 per Landau J. A similar approach, in which the Court declared that, absent “special circumstances,” far-reaching change of legislative or other character should not be introduced unless “for the benefit of the inhabitants” was taken in *Jerusalem Electrical Company v Minister for Energy* (1981) 11 *Isr YBHR* 354, at 357, but the court there did not impose an obligation to do so.

1945. The program has been argued to be of little precedential value because it occurred during a post-surrender, treaty-based occupation, and changes not directly arising from military necessity were directed to improving institutions below international standards.⁸⁰ However, Goodman identifies a customary right of occupants “to make substantive changes in substandard structures” to bring them to the level generally recognised by “civilised countries.”⁸¹ Human rights law is said to identify the interstices an occupant might attempt to fill,⁸² apparently through common Article 3(1d). There is also international judicial support for the view that “positive changes” can be introduced to achieve such goals.⁸³

This is where the primary tension with the asserted permission for humanitarian intervention in domestic legal systems and institutions arises. The right of peoples to self-determination has been recognised as a right *erga omnes*.⁸⁴ A right having that character invests an interest in all states in its observation and perpetuation,⁸⁵ including the occupant where the occupant is a State and including international intervening forces, for which each participating state has an interest in facilitation. The occupant is therefore bound not to preclude the exercise of self-determination in domestic institutional forms.

The Coalition Provisional Authority (CPA) in Iraq, for example, asserted a broad humanitarian power when it assumed temporary “powers of government,” claiming it “to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable

⁸⁰Goodman, above n18, at 1579.

⁸¹Ibid, at 1576, 1579. It has been suggested, alternatively, that since there was neither a legitimate German government whose sovereignty required protection, or a need to “protect the inhabitants from being exploited for the prosecution of the occupant’s war,” the Hague Regulations did not apply as of law: see summary in Roberts, above n2, at 48. However, common Article 2 of Geneva IV applies it to post-surrender occupations and in any case the emergence of self-determination as a legitimate interest to be protected under occupation resolves the first dispute.

⁸²Roberts, above n2, at 48-9.

⁸³*Namibia Case*, above n3, and see further Roberts, above n2, at 49.

⁸⁴*East Timor (Portugal v Australia)* [1995] ICJ Rep 102, para 29; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 68, para 162; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n13, paras 88-9.

⁸⁵*Barcelona Traction, Light and Power Company Ltd (Second Phase)* [1970] ICJ Rep 3, at 33. Meron argues that many of the norms in the Geneva Conventions, particularly in common Article 3, also attract this *ius cogens/erga omnes* character, imposing a duty on States “not to encourage others to violate the norms, and, perhaps, even to discourage others from violating them:” above n9, at 355.

reconstruction and development”⁸⁶ - the criticality of self-determination is evident. The obligation to assist in the exercise of self-determination is in stark contrast to the asserted obligation, and at a minimum the permission, to intervene in domestic institutions and legal forms for the benefit of the inhabitants of the occupied territory. This is notwithstanding, but contradictory to, extra-territorial human rights obligations, some of which may be *ius cogens* rights, upon the occupant. The tension is resolvable by permitting occupants, in the pursuit of their own rights obligations, to intervene to prevent rights abuses in the short-term, perhaps by suspension of laws, institutions or activities. However, permanent regulatory change is to be reserved pending self-determination.

The CPA sought to achieve this by an expedient means of ‘delegating’ some of its claimed legislative competence to a domestic body established under its aegis, in this case the Iraqi Governing Council. For example, it “delegated” authority to create and empower the Public Integrity Commission to the Governing Council.⁸⁷ However such measures cannot meet the burden imposed by the *erga omnes* character of the right to self-determination, because the fact of delegation relies on a claim of actual competence. In cases where the state of the judicial structure or society is the basis for the intervention, it has been argued that “any measures” for the benefit of the community, including “the replacement of government and central institutions” could be accommodated under occupation law.⁸⁸ The view is reconciled with self-determination on the grounds that the deposed regime “did not truly represent the sovereign people could therefore be ignored.”⁸⁹

The effects of the fundamental tension between a desire for altruistic interventionism and self-determination are demonstrated in succeeding chapters when considering the means considered permissible for intervening in domestic judicial structures, and the capacity of those measures to achieve the domestic rule of law. As the latter is a relationship defined by instrumental rules agreed between the

⁸⁶Section 1(1), *CPA Regulation 1* (16 May 2003). See also *CPA Order 7: Penal Code* (10 June 2003), which asserted a right to act “on behalf of and for the benefit, of the Iraqi people” (prefatory remarks), indicative of *opinio iuris* on the subject.

⁸⁷*CPA Order 55: Delegation of Authority Regarding the Iraq Commission on Public Integrity* (28 January 2004).

⁸⁸Benvenisti, above n75, p166.

⁸⁹Benvenisti, *ibid*, p183; Kelly, above n9, para 541.

subjects of the legal system, it is a core expression of self-determination and therefore of legitimacy.

2.4 Conclusion: The Concern of Occupation Law with the Domestic Rule of Law

The law of occupation is not fundamentally concerned with the domestic rule of law, indeed it does not mention the term at all. Its function is the arrangement of authority to permit the restoration and continuation of civil life and orderly government, pending a final determination of the locus of sovereignty – whether that is reversion to the previous State, cession to the occupying State, or, more popularly now, independence as a new State or by inclusion into a State of choice. The legislative competence of the occupant, while less obligatory under Geneva IV than the Hague Regulations, nonetheless is limited in certain significant respects to non-intervention in formal domestic institutions and legal structures, unless there is a pragmatic need for it to assure the administration of justice (but not any subjective conception of ‘justice’ itself). The preoccupation is with orderliness, which will be seen, along with security, to be a precursor to the formation of the domestic rule of law.

Extrapolating the preference of occupation law for non-intervention in domestic structures unless positively required, and unless within the discretionary scope of the occupant to provide, the rule of law theory it actually supports is the relationship theory. In its emphasis on security and order, occupation law is intent on preserving for the population the scope to determine the nature of their domestic legal relationships.

CHAPTER THREE:

THE ADMINISTRATION OF JUDICIAL INSTITUTIONS

UNDER THE LAW OF OCCUPATION

As judicial institutions are typically identified as the heart of a rule of law society,¹ the authority of the occupant to intervene in the domestic judiciary or change the landscape of the domestic court structure warrants close examination. The most recent case of a military intervention attracting the character of occupation is the Coalition occupation of Iraq in 2003-4, which engaged in a variety of efforts directed towards the rule of law.² However it represents only the present culmination of a body of state practice illuminating the scope and intent of occupants' intervention in domestic judicial administration.

Article 64, *Convention IV Relative to the Protection of Civilian Persons in Time of War 1949* ("Geneva IV"),³ makes clear that the domestic judicial structure is to continue in force. Subject to obligations imposed by the Convention itself and "the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered" by extant penal laws. As a de facto administrator only, the occupant does not assume control of the domestic courts as organs of its own government.⁴ However, in two prominent occupations, the 1945 Allied occupation of Germany and the 2003 occupation of Iraq, where it was said that the domestic judicial institutions were so lacking in the features accepted by civilised people that they were not properly called

¹See Chapter One above.

²UNSC Resolution 1483 (2003) noted the status of the Coalition as occupants in its prefatory remarks. The key judicial structural change introduced by the Coalition Provisional Authority ("CPA") as the occupation authority was the Central Criminal Court of Iraq, while the judiciary was 'de-Ba'athified' (a process by which personnel associated in defined ways with the preceding regime were purged) and procedural laws amended for security and human rights-based reasons. These interventions will be elaborated in the following discussion.

³12 August 1949, Geneva, 75 UNTS 287, entered into force 21 October 1950.

⁴Felice Morgenstern, 'Validity of the Acts of the Belligerent Occupant' (1951) 28 *BYBIL* 291, at 321.

courts at all,⁵ a substantially broader right to intervene to create an altogether new judicial administration was asserted. Further, in its prolonged occupation of the Palestinian territories since 1967, Israel argues for substantive rights of intervention to achieve social ends for itself and for the subject peoples.

Occupation law specifically contemplates the creation of security-related offences, tried by occupation military courts.⁶ This explicit authority is consonant with the derivation of the occupant's legislative competence from order and security as set out in the preceding chapter. Beyond that, it is the definition of "administration of justice" and the "necessity" of ensuring its efficacy, either under an expansive understanding of security or otherwise, which is the essence of the judicial reconstruction debate in the case of occupation. This is to be interpreted against Geneva IV and *Annexe to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land* ("Hague Regulations"),⁷ and their joint emphasis on preserving the status quo for the reversioner.

This chapter considers what meaning can be extracted for these terms from the body of circumstances in which occupants have attempted to intervene in domestic judicial structures. This has included the use of existing courts for security purposes; creation of courts using extant authority under municipal law or to replace existing jurisdiction lost by fact of occupation; creation of altogether new courts; ideological or policy-based intervention in the selection of judicial personnel; or by making substantive changes to judicial process. It is these aspects of court institutions and personnel, primarily in the field of criminal justice, which are argued by interventionists to comprise the rule of law.⁸ However, what stands in issue is not

⁵For example, the lack of an "independent judiciary" was identified by the CPA in Iraq as "one fundamentally malign feature of the former regime that undermined the rule of law." The CPA sought to ameliorate it by making amendments to the regulations governing the judiciary, with a view to creating an "independent judicial administration." *CPA Memorandum 12 – Administration of Independent Judiciary*, entered into force 8 May 2004 and implementing the "independent judiciary as provided for in CPA Order No. 35 and the Law of Administration for the State of Iraq for the Transitional Period," recitals and see section 1. The legal system under the Nazi regime in Germany, 1933-45, was judged criminal in *United States of America v. Altstötter et al.*, (1948) 3 T.WC 1 ("Justice Trial").

⁶Articles 64(2) and 66, Geneva IV.

⁷18 October 1907, The Hague, (1908) 2 *AJIL* Supplement 90-117, entered into force 26 January 1910.

⁸See the 'blueprint' analysis discussed in Chapter One above: for example, Rachel Kleinfeld, 'Competing Definitions of the Rule of Law,' in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC,

the rule of law but the conception of security. More recent practice, especially in Iraq and the Palestinian areas suggests that an occupant appointing itself to the construction of the 'rule of law' above the indigenous population generally encounters hindrances from the lack of basic security. Indeed, they may find the security situation worsening, notwithstanding avowals of a security purpose behind the intervention itself. Security must precede the formation of the rule of law, which can occur only after the occupation.

3.1 Use of Domestic Criminal Courts to Try Occupation-Related Security Offences

An occupant has full powers to establish separate, special courts and processes to resolve security offences committed against its forces in the course of the occupation, so long as they are "properly constituted, non-political, military courts" and sit in the occupied area.⁹ German occupation courts in the Second World War were subsequently upheld by Greek judicial review as "lawfully established local courts."¹⁰ The authority under law for special courts means they are not of themselves contrary to human rights law.¹¹

2006, pp31-73; Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006.

⁹Article 66, Geneva IV, using the Article 64 jurisdiction to establish security offences. Courts of appeal need not necessarily sit in the occupied area. See further Michael Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*, Australia Government Publishing Service, Canberra, 1997, para 539; Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p111. For example, Israel has established such courts in the West Bank (*Order Concerning Security Provisions*, 378/1970), applying Israeli procedure and evidence: *The Rule of Law in the Areas Administered by Israel*, Israel National Section of the International Commission of Jurists, Tel Aviv, 1981, pp25-27, 31. In West Bank cases involving security issues, or in which the accused is an Israeli citizen, military jurisdiction is compulsory: section 2, *Order for Closing Files 841/1980*, and see Israeli National Section of the International Commission of Jurists, *ibid*, p32.

¹⁰*German Military Courts in Greece Case* [1945] Ann Dig, Case Nr 149 (Athens Court of Appeal, Greece, 645/1945).

¹¹Article 14(1), *International Covenant on Civil and Political Rights 1966*, adopted by General Assembly Resolution 2200 (1966), A/RES/2200A XXI, 999 UNTS 171, entered into force 23 March 1976 ("ICCPR"); Article 8, *American Convention on Human Rights*, adopted by the Organisation of American States, 2 November 1969, San José, 1144 UNTS 123, entered into force 18 July 1978 (also known as the *Pact of San José*) ("ACHR"); Article 6(1), *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Council of Europe, 4 November 1950, Rome, 213 UNTS 221, entered into force 3 September 1953 ("ECHR") all require that no one be tried in a court not established by law, as opposed to, for example, a tribunal established by executive decree. Article 8, ACHR, further specifies that it should be "previously established by law."

Some commentators suggest that Article 73, Geneva IV, provides an administrative means to rely on the domestic courts of the occupant for appeals from military courts, establishing appeal rights to the “competent authority” of the occupant where not otherwise specified.¹² In cases where no appeal mechanism is identified, however it prescribes no means by which courts governed by a dualist understanding of the application of international law (Geneva IV) may recognise and hear the petition.¹³ In such cases, the occupant would need to make provision for appeals; Article 66 provides for “preferable” local sitting of courts of appeal but its construction is based on the assumed existence of courts of appeal somewhere. It may be concluded from this provision that occupation law envisages the existence of a review mechanism as an essential element of judicial institutions. It follows that Israeli Proclamation 378 in the West Bank, conferring temporally unlimited criminal jurisdiction on military courts with no right of subject-initiated appeal contravenes an essential requirement, notwithstanding review by the Area Commander.¹⁴

3.1.2 *Endowing Municipal Courts with the Occupant’s Security Jurisdiction*

The alternative means to prosecute security offences in practice, where separate military courts are not established, is to endow extant or newly created domestic courts with jurisdiction over security offences against the occupant. The Coalition in Iraq did so through the Central Criminal Court of Iraq in al-Karkh, Baghdad, (“CCCI-K”)¹⁵ a court it had itself established as a novel Iraqi federal

¹²Von Glahn, above n9, p117; Jean Pictet, *The Geneva Conventions of 1949: Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p358; Israeli National Section of the International Commission of Jurists, above n9, p28. Article 73, Geneva IV, provides that: “A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so. The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.”

¹³Dualism being the state of domestic jurisprudence in which international law expressed in treaties is not considered part of domestic law unless positively incorporated (dual systems). Australia takes this general position: *Nulyarimma v Thompson; Buzzacott v Hill* [1999] FCA 1192.

¹⁴Article 50, *Order Concerning Security Provisions 378/1970*.

¹⁵The Central Criminal Court of Iraq (“CCCI”) was first established in 2003 in the Baghdad suburb of al-Karkh; a second facility was later opened in 2007 in different circumstances and to a slightly different purpose in the suburb of al-Rusafa. The two courts are now known respectively as the CCCI-Karkh and the CCCI-Rusafa and need to be distinguished, at least until the expiry of UN Security Council authorisation to the Multi-National Force – Iraq (MNF-I) on 31 December 2008, which is the period with which this study is concerned. It had been extended to that date in UNSC Resolution 1790 (2007).

criminal court in June 2003;¹⁶ a point to be addressed further below. The CCCI-K was given “nationwide discretionary investigative and trial jurisdiction over any and all criminal violations, regardless of where those offenses occurred,” including the jurisdiction of all local felony and misdemeanour courts, but was directed to “concentrate” on terrorism, organised crime, governmental corruption, destabilisation of Iraqi democracy, discriminatory violence, and instances in which a criminal defendant may not be able to obtain a fair trial in a local court.”¹⁷

In establishing the CCCI-K, the CPA asserted reliance on its “duty to restore and maintain order and its right to ensure its security and fundamental standards of due process” and its scope to act “on behalf, and for the benefit of the Iraqi people.”¹⁸ Further, Administrator Bremer asserted in his press release that its purpose was “the urgent security needs of the people of Iraq and Coalition Forces.”¹⁹ Thus it appears that the CPA interpreted its overarching obligation to restore order and security as sufficient justification to confer its accepted but separate security jurisdiction directly upon domestic courts. This is apparent from the nature of the CCCI-K’s subject matter jurisdiction; the Administrator’s retention of a direct element of control over the court’s docket with a right to refer cases with priority, in addition to the CCCI-K’s self-seised matters;²⁰ and, finally, Coalition participation directly in CCCI-K process, including investigation, case preparation, ‘bringing cases’ and even appearance at hearing,²¹ which is prohibited for persons not registered to practice in Iraq, without permission of the Minister of Justice.²²

¹⁶Jackie Spinner, ‘Iraq’s New Forum of Justice Seems to Satisfy Few,’ *The Washington Post*, 4 August 2004, p.A12, <http://www.washingtonpost.com/ac2/wp-dyn/A378152004Aug3?language=printer>, viewed 23 March 2008.

¹⁷Section 18, *CPA Order 13 – The Central Criminal Court of Iraq (Revised) (Amended)*, entered into force 22 April 2004 (“*CPA Order 13*”).

¹⁸Prefatory remarks, *CPA Order 13*.

¹⁹Office of the Administrator of the CPA, Baghdad, Iraq, *Public Notice Regarding the Creation of a Central Criminal Court of Iraq and Adjustments to the Criminal Procedure Code*, 18 June 2003.

²⁰Section 19(1), *CPA Order 13*.

²¹By Christmas 2004, “U.S. military officials [had] brought 200” of a total of 900 cases, according to a military lawyer posted to Task Force 134, the unit associated with the CCCI-K. That official, McLaughlin, also commented that “We do 98 percent of the work. We package the cases, then they’re presented by an Iraqi prosecutor at trial.” Joseph Giordano, ‘Trying Insurgents in Iraqi Courts Seen as Big Step in Rebuilding Legal System,’ *Stars and Stripes (Mideast Edn)*, 26 December 2004, http://www.military.com/NewContent/0,13190,SS_122704_Court,00.html, viewed 13 October 2009; see also Michael Moss, ‘Iraq’s Legal System Stagers Beneath the Weight of War,’ *The New York Times*, 17 December 2006, <http://www.nytimes.com/2006/12/17/world/middleeast/17justice.html?ei=5090&en=7fa73a4895399700&ex=1324011600&partner=rssuserland&emc=rss&pagewanted=all>, viewed 13 October 2009. Perceptions differ, however. Chief Judge Luqman Thabit stated that the only

From a legalist perspective, the appearance of occupation military lawyers, whether to resolve a local shortage of prosecutors or to maintain oversight of matters in which the occupant has an interest (as is the case, by definition, in security offences against the occupant), has two draw-backs: the apparent subordination of the occupier to local law and procedures, contrary to international law; and the possible appearance of partiality for a judge deferring to the military lawyer, representative of the occupying power and superior authority.²³ Significantly, there was no Coalition legal involvement before the CCCI-K in the provision of defence counsel, notwithstanding that it was heavily criticised for the lack of effective defence, through inadequate provision for legal aid on a cost-per-file basis, a lack of time to prepare and in some cases reticence on the part of Iraqi counsel. The essential cause appeared to be lack of security.²⁴

If security needs were its asserted justification, the CCCI-K tended to satisfy neither the occupant nor the occupied. Among both Coalition forces and Iraqis, many did not consider the proceedings ‘fair,’ a key rule of law measure, each because of the involvement of the other in the process and establishment of the court.²⁵ Coalition forces in the field objected to the allegedly minimalist sentencing practice of the CCCI-K with detention served in Iraqi prisons for offences affecting their own security.²⁶ They criticised the CCCI-K’s “results-oriented jurisprudence” and the “absurdities” in its proceedings, apparently because the court did not produce the conviction rate and average sentencing which equalled the justice ‘deserved’ by US

Coalition role in proceedings was to provide an interpreter for foreign witnesses and that the Court was “fully independent.” Spinner, above n16.

²²*Iraqi Bar Association*, al-Mansour, Baghdad, August 2007, <http://iraqilawyers.net/index.php>, viewed 29 March 2010. The registration of lawyers is governed by the *Lawyers Code 173/1965*. Foreign lawyers may be given permission to appear by the Minister of Justice and the Bar Association, if retained.

²³Interview with Major Bernard Bercik, Karbala, August 2003, reported in Center for Law and Military Operations (CLAMO), *Rule of Law Handbook*, Charlottesville (VA), 2007, p188.

²⁴“Most defense lawyers are appointed by the court and paid \$15 per case. Even if they are so inclined, they are largely unable to gather evidence because of the threat of violence. One American lawyer said that in 100 cases he handled, not one defense lawyer had introduced evidence or witnesses.” Moss, above n21.

²⁵Spinner, above n16.

²⁶*Ibid.* The range for terror-related convictions reported in the American military press was six months to 30 years: Giordano, above n21. This is on top of an approximate 50% conviction rate after 3000 proceedings before the CCCI-K: Moss, above n21. Confusingly, in 2004, Coalition military lawyers claimed that the CCCI-K’s conviction rate was over 90%, while it appeared anecdotally that as many as one quarter of detainees were released without trial: Giordano, *ibid.* This would make the overall conviction rate more like 67%.

military personnel.²⁷ The essence of this criticism is that the employment of domestic courts to prosecute security offences could not achieve retribution, unlike military occupation courts as conceived by Geneva IV.²⁸ Although the CCCI-K was established with a security rather than a retributive purpose, its inability to satisfy the perception of justice for occupying forces was said to lead to a preference for killing rather than capturing insurgents who attacked US forces,²⁹ directly affecting security in Iraq and contrary to the principle of unnecessary suffering which is “cardinal” for humanitarian law.³⁰ The Iraqi judges, however, considered part of the problem to be reliance on arrest and evidence given by untrained Coalition soldiers which did not meet minimum requirements for conviction under Iraqi law.³¹

Finally, the lack of security affected the CCCI-K’s ability to effect release of acquitted detainees held in Coalition custody, who could be retained in detention on post-trial administrative review if the Coalition considered them a security risk - Iraqi defence counsel complained that they were not allowed to attend the review hearing, and neither was the detainee.³² The existence of this process contradicts the avowed purpose of utilising the CCCI-K to hear these offences in order to respond to the security situation in Iraq. Nor is a parallel system of administrative detention reconcilable with an interest in the rule of law, as discussed further below.

²⁷The procedural features which Frank labels ‘absurdities’ include: the exemption of the defendant from the requirement to testify on oath, which Frank admits may originate in Islamic prescriptions; the requirement for two eye-witnesses to the elements of the offence, similarly Islamic in origin, which he says “inhibits justice in that it virtually begs for the crafting of exceptions, particularly in cases where the application of such a rule would result in the release of dangerous terrorists;” the absence of plea bargaining; closing of the prosecutorial record after the investigative hearing, so that rebuttal evidence cannot be called to the non-disclosed defence case; absence of cross-examination of defence witnesses in particular, compared to “hostile” cross-examination of US prosecution witnesses; the setting of too high a bar for conviction for attempted murder; refusal to convict for the crime of conspiracy; and “disdain” for mandatory minimum sentences as legislated by the CPA: Michael Frank, ‘Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq’ (2006) 18 *Florida J of Intl Law* 1, in Part III. It can be seen that many, but not quite all, of these criticisms are rooted in the author’s stated preference for a common law criminal system rather than civil law, see p21 where he describes civil law training as a “flaw” in Iraqi judges. Oddly from a rule of law perspective, he found some of the requirements of the Iraqi codes “more burdensome” because US prosecutors were not familiar with them and unduly restrictive because Iraqi law ‘handicapped’ US attorneys by not granting them standing to appear at trials or file appeals: see respectively p96 and 53 for example.

²⁸*Ibid*, at 103-4.

²⁹*Ibid*, at 83.

³⁰*Legality of the Threat or Use of Nuclear Weapons* (1996) 1 ICJ Rep 239 (Advisory Opinion of 8 July), para 78.

³¹Qasim Hassan al-Aboudi, the manager of legal and media affairs for the Higher Judicial Council in Iraq, stated that this procedural insufficiency mandated acquittal: Moss, above n21.

³²Moss, *ibid*.

The utility of domestic courts in hearing occupation-related security offences is limited. The primary example, the CCCI-K, demonstrates a failure of the court's activities to improve security, and indeed its inefficacy was popularly linked to the worsening security situation. It follows that this is an ineffective means of achieving security and order, and it is difficult to see that it is a necessary act for the administration of municipal justice, since Geneva IV contemplates a separate system of military courts to resolve offences against the occupant.

3.2 Completing the 'Administration of Justice:' Adding to or Adjusting the Domestic Court Hierarchy within the Contemplation of Municipal Law

Although the occupant clearly has not the full domestic competence previously exercised by the sovereign, but only de facto administrative authority, it may be seen as 'necessary' for the administration of justice to exercise an extant authority in domestic law to create courts. For example, the CPA established regional Courts of Appeal in Maysan and Muthanna provinces in Iraq "pursuant to Article 16(3) of the *Judicial Organisation Code, Law 160/1979*."³³ The courts were consistent with the existing provincial hierarchy and the authority to create them was deliberately not exercised under the previous regime, it was said, as part of a discriminatory, destabilising scheme. The CPA explicitly relied on the necessity of the administration of justice as its authority.³⁴ Further, since discriminatory practice is contrary to requirements of Geneva IV in common Article 2, Article 64 would also authorise the creation of these courts. Earlier authority, in which Burma upheld domestic courts established under Japanese occupation, simply requires that such courts be constituted "in accordance with the municipal law of the occupied country" and must administer "municipal law."³⁵

³³Section 1, *CPA Order 58 – Maysan and Muthanna Courts of Appeal*, entered into force 10 February 2004 ("*CPA Order 58*").

³⁴In its prefatory remarks, *CPA Order 58* recognises inter alia "the importance of the proper and efficient administration of the court system" and that "the former regime manipulated the court system against disfavoured regions and peoples of Iraq by denying them access to justice."

³⁵*The King v Maung Hmin* [1946] Ann Dig, Case No 139 (High Court of Burma, 11 March 1946), at 337, and also *Maung Hli Maung v Ko Maung Maung* [1946] Ann Dig, Case No 141 (High Court of Burma, 20 December 1946); and see Yaron Butovsky, 'Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank' (1983) 21 *Can YBIL* 217, at 225.

By contrast, in the Allied occupation of Germany from 1945, the restructure of the German judicial system was based on reversion to an earlier regional judicial system which had been adjusted under Nazism, and abolition of the special court system which characterised Hitler's regime.³⁶ Notwithstanding dispute as to the applicability of occupation law to Germany, this is consistent with an interpretation of Article 43, Hague Regulations, in which 'restoring' *la vie publique* equates to restoring the last state of affairs which the occupant considers consistent with *une vie publique*. Establishing courts provided for but never set up under municipal law still extant is not a case of restoring anything at all, but must draw directly on the Geneva IV "necessity," a mandatory phrase, for "ensuring the effective administration of justice." Where the Iraqi system was regional, and two identifiable regions lacked an essential level in the judicial hierarchy, the action is within the contemplation of Geneva IV, particularly where directed to the removal of discrimination contrary to Geneva IV.

3.2.1 *Intent to Inculcate Values in the Revived Municipal Court Structure*

The Allied reversion to earlier German structures is broadly consistent with the purpose of Geneva IV regime, as it could be argued that where the deposed regime or judicial structure was judged criminal, it could never have been part of *la vie publique*. Therefore, the natural point of restoration is reversion to the previous system. The Nazi judicial system was formally determined as such by the subsequent Nuremberg military tribunals.³⁷ However, the stated purpose of the German reorganisation was explicitly to introduce "democracy, civilization and justice" to the judicial system.³⁸ As discussed in Chapter Two, the legislative competence of the occupant, while less obligatory under Geneva IV than the Hague Regulations, nonetheless is limited in certain significant respects to non-intervention in formal domestic institutions and legal structures, unless there is a pragmatic need for it to

³⁶The People's Court, NSDAP (party) Courts and Special Courts were abolished in Article 3, *Control Council Proclamation 3: Fundamental Principles of Judicial Reform*, CONL/P(45)48, amended by CONL/II(45)9, Berlin, 20 October 1945 ("*Control Council Proclamation 3*"). The judicial system was then 'reorganised' and the provincial Amtsgerichte, Landgerichte and Oberlandesgerichte were 'reestablished' "in conformity with the Law concerning the Structure of the Judiciary of 27 January 1877, Edition of 22 March 1924." The jurisdiction of the re-established courts was "in general [to] be determined in conformity with the law in force on 30 January 1933," just prior to Hitler's seizure of power: Articles 1-2, *Control Council Law 4: Reorganisation of the German Judicial System*, CONL/P(45)50, Berlin, 30 October 1945 ("*Control Council Law 4*").

³⁷*US v. Altstötter et al* (1948) 3 TWC 1 ("*Justice Trial*").

³⁸Prefatory remarks, *Control Council Proclamation 3*.

assure the administration of justice (but not any subjective conception of ‘justice’ itself). The preoccupation is with order and security. Proponents of democratic peace theory³⁹ might argue that the inculcation of democratic values is directed to achieving security, at least between states, but this does not assist in creating security for the occupant because the presence of the occupant is itself undemocratic. It must follow that the reversion of the court structure to the pre-Nazi hierarchy is acceptable for the necessary administration of justice, and avoidance of discriminatory treatment precluded by Geneva IV, however the intended purpose of instilling certain values is not coterminous.

3.2.2 *Amendments to Extant Municipal Jurisdiction, Especially Civil Jurisdiction*

Where the adjustment of extant court jurisdiction occurs through procedural amendments to municipal law, authority becomes more clouded. This tends to be the result of the protracted occupation or purported annexation. In the West Bank, Palestinian lawyers argue that Israeli occupation authorities altered the effective jurisdiction of Shariah personal status courts for Muslims, by refusing to allow their decisions to be enforced in the execution departments of the non-religious court structure, as permitted under Jordanian law.⁴⁰ In east Jerusalem, these courts and the Christian Ecclesiastical Courts were effectively abolished on annexation because succession is within the exclusive jurisdiction of the District Court under Israeli law.⁴¹ While the unlawfulness of annexation distinguishes the latter, Article 64 does not provide a complete answer to the problem because it provides only that the “penal laws” and tribunals enforcing them in the occupied territory shall continue in force. However, the background of *la vie publique* in the Hague Regulations, Article

³⁹For example John Norton Moore, ‘Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance’ (1997) 37 *Virg J Int’l L* 811 and see section 1.3.3 above.

⁴⁰The Shariah courts had been under the control of the Qadi al-Qudaa (Chief Judge), a statutory appointment at ministerial level. Shehadeh and Kuttab argue that the intervention was in response to the failure of the courts to submit to the occupant’s desire to control judicial appointments and to levy revenue stamps against religious courts, which was not previously required: Raja Shehadeh and Jonathan Kuttab, *The West Bank and the Rule of Law*, The International Commission of Jurists, Geneva, 1980, pp21-2. Article 105 of the Jordanian Constitution provided that all matters of personal status for Muslims and Christians were within the jurisdiction of the Shariah and Ecclesiastical courts respectively.

⁴¹The Jordanian Constitution in Article 99 provides for three categories of courts: regular courts, which in practice have a broad criminal and administrative jurisdiction, religious courts for matters of personal status, including succession, and special courts: Shehadeh and Kuttab, *ibid*, pp20-1.

43, strongly suggests that interference of this kind, fundamentally changing the status quo ante without obvious benefit to the population, would be unlawful, nor is it consistent with the domestic rule of law in which one would expect the organisation of instrumental rules about personal status determination to be settled indigenously.

3.2.3 *Creation of Municipal Court Access to Replace Capacity Lost by Fact of Occupation*

Given that only a part of a state may be under occupation,⁴² it is conceivable that the fact of occupation itself may prevent access to some levels of the indigenous court structure. Must or may the occupant take expedient measures to make good such structural problems? For example, the British occupation of the provinces of Baghdad, Basra and Mosul in 1915 precluded access to the supreme Court of Cassation in Istanbul. The situation remained unresolved until the post-war formation of Iraq and the creation of a new Iraqi Court of Cassation under Article 81 of the 1925 Constitution.⁴³ Similarly in the West Bank the Court of Cassation, the highest appeal court, remains outside the boundaries of the occupied area in Amman (Jordan). Whether it has been ‘abolished,’ as claimed by Palestinian lawyers, or is simply ‘inaccessible’ since the commencement of occupation,⁴⁴ the result is a gap in the indigenous court structure. Israeli military lawyers recognise no obligation to create a new superior court, and question the existence of authority to do so anyway.⁴⁵ Interim measures were taken for cases already listed before the courts,⁴⁶ as required for the ‘administration of justice’ under Article 64(2).

⁴²Article 2, Geneva IV.

⁴³Chief Judge Medhat al-Mahmoud, ‘The Judicial System in Iraq: A Review of the Legislation Regulating Judicial Affairs in Iraq,’ *Iraqi Judicial Forum: The Judicial System in Iraq, Facts and Prospects*, Baghdad, 2004, pp7-8. Originally a system of independent city-states of which one of the largest was biblical Babylon, the area of modern Iraq had, since the sixteenth and seventeenth centuries, fallen under the rule of the Ottomans not as one but as three provinces: Mosul, Baghdad and Basra. Tripp describes the provinces as “frontier lands” between the Sunni Ottoman empire, and the Shi’ite Safavid shahs of Persia: Charles Tripp, *A History of Iraq*, 3rd Edn, Cambridge University Press, Cambridge, 2007, p8.

⁴⁴Israeli National Section of the International Commission of Jurists, above n9, p22; Yoram Dinstein, ‘Belligerent Occupation and Human Rights’ (1978) 8 *Isr YBHR* 104, at 115; C. Fairman, ‘Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste’ (1951) 45 *AJIL* 541, at 548, in support of the proposition that an occupant is not required to continue dependence on courts not under its control. Compare the objection of Palestinians Shehadeh and Kuttab that access to the High Court of Justice depends on the consent of the Attorney-General, which can be withdrawn at any time, leaving the West Bank with no final court of appeal: above n40, p26.

⁴⁵Israeli National Section of the International Commission of Jurists, *ibid*, p22.

⁴⁶*Order Concerning Jurisdiction in Criminal Offences 30/1967*.

Requiring an occupant to facilitate access to a court previously part of the social and legal order, now external to the occupied territory, would amount to “dependence on the enemy,” and is not required by humanitarian law.⁴⁷ Alternatively, any obligation to ensure access would be subject in this situation to the defence of impossibility in Article 61 of the *Vienna Convention on the Law of Treaties 1969*.⁴⁸ The situation is to be distinguished from the removal of the West Bank regional Court of Appeal from annexed Jerusalem to Ramallah,⁴⁹ for example, since the annexation of Arab East Jerusalem was unlawful, and therefore inaccessibility was not a direct consequence of occupation.

The Israeli solution is access to the Israeli High Court of Justice as a final appeal court, and also a court of limited review of the occupying administration, by consent of the Israeli Attorney-General. It is justified as necessary for the “rule of law” in the West Bank by promoting transparency and legality in the occupation administration and impartial review,⁵⁰ and also to the Israeli rule of law and its “liberal norms.”⁵¹ Israel asserts two imperatives on the occupant: to ensure the international rule of law through facilitation of judicial access but also to comply with its own domestic requirements for the rule of law. The tension reflects the broader tension between an international rule of law and inconsistent domestic rule of law systems.

The problems with the approach in practice are manifold. In the first place, the internal Israeli problem of adjusting domestic jurisdiction to account for matters arising extra-territorially from an occupied area are substantial and have been got around in this case simply by absence of objection from the Attorney-General of Israel.⁵² The court’s extraterritorial jurisdiction over the activities of “all organs of

⁴⁷Dinstein, above n43, at 115.

⁴⁸Adopted 22 May 1969, Vienna, 1155 UNTS 331, entered into force 27 January 1980 (“*Vienna Convention*”). However, Article 61(2) of the *Vienna Convention* provides that “Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”

⁴⁹*Military Proclamation 39/1967*. See further Shehadeh and Kuttab, above n40, p20; Butovsky, above n35, at 225.

⁵⁰Israeli National Section of the International Commission of Jurists, above n9, p42.

⁵¹*Ibid*, p99.

⁵²Meir Shamgar, ‘The Observance of International Law in the Administered Territories,’ (1970) 1 *Isr YBHR* 266, at 273. The Israeli National Section of the International Commission of Jurists notes that access to Israeli courts “was made possible by a decision of the Government of Israel not to oppose

the Government of Israel,” regardless of the location of their acts or omissions,⁵³ which would cover appeals from the military courts and petitions against the Military Commander, does not replicate the appellate nor the original jurisdiction of the Amman Court of Cassation.⁵⁴ There is also the problem of approval of access to the Israeli court, both in Israel and the Palestinian territories, disputed by both sides,⁵⁵ not unlike the public rejection of the CCCI-K. However, if the failure of locals to make use of occupation or Israeli national courts is due to terror and intimidation, as Cohen suggests,⁵⁶ it might reasonably be concluded that the occupation authority has failed in its primary obligation to restore the public order to the extent necessary for the populace to feel able to use the court structures available.⁵⁷ As it is, the attitude of neither party is conducive to a mutual rule of law relationship.

If the role of the Israeli High Court is essential for the maintenance of the rule of law, then two additional criticisms carry substantial weight. It must be questioned whether the provision of a final appeals and petitions court based on the British-derived common law adversarial system practised in Israel, at the apex of a Jordanian inquisitorial system,⁵⁸ represents any cohesive rule of law system. Equally as importantly, petitions originating in the occupied area as opposed to Israel are judged according to separate standards: in the latter, a dualist view means that the impugned act of government is assessed under the authorising statute, whereas Palestinian petitions are decided on a two-stage test: “(a) according to the existing laws, including Jordanian law and Orders of the Regional Commander; (b) according to the rules of international law which have been incorporated in Israeli law, ie,

applications and claims by raising legal arguments regarding the right of Israeli courts to judge such suits. The decision applied to both civil suits in the ordinary courts and to petitions to the Supreme Court sitting as a High Court of Justice.” *ibid*, p35.

⁵³See further section 7, *Courts Law 1957*; Justice Haim Cohen, ‘Introduction,’ in Israeli National Section of the International Commission of Jurists, *ibid*, p.x.

⁵⁴For example, the Court of Cassation in Amman could constitute itself a board to determine references from the government for interpretation of “any law of general importance:” Shehadeh and Kuttab, above n40, p19.

⁵⁵There is a link between differing levels of Israeli public support and the current docket of the court, specifically the inclusion of cases seen as political: Israeli National Section of the International Commission of Jurists, above n9, p35. Further, many Palestinians see it as an occupation court and therefore biased and to be avoided: Cohen, above n52, p.xi.

⁵⁶Cohen, *ibid*.

⁵⁷It is also identified as a cause for the increase in matters and therefore slow-down and poorer quality of decisions in the Court of Appeal in the West Bank. Palestinian commentators argue that the Court of Appeal has tried to take up the slack caused by the absence of the Court of Cassation, by adopting a form of jurisdiction as a High Court of Justice for which its members are not trained or experienced. This is in addition to, not in lieu of, its appellate jurisdiction: Shehadeh and Kuttab, above n40, p19.

⁵⁸Israeli National Section of the International Commission of Jurists, above n9, p36.

customary international law. The court is also prepared to consider rules of conventional international law which have not been so incorporated.”⁵⁹

Expediency takes another face when the reason for the non-availability of indigenous review is the refusal of local courts to act while the territory remains under occupation. For example, when Israel seized the Syrian Golan Heights in 1967, judges and lawyers fled en masse, taking with them most of the printed laws of the areas. In their place, Israel established a civil court staffed by an Israeli judge, applying Israeli law in the absence of copies of the Syrian law.⁶⁰ Although the employment of Israeli law is objectionable under occupation law, where municipal law is available, Article 64 provides for ‘necessary’ administration of justice, and therefore if the measure was immediately necessary and interim, it could be acceptable.

Where indigenous courts refuse to continue acting, it is part of the occupant’s obligation to restore public order either to create military courts applying existing local law, or to create another system of civil courts to provide for the continued functioning of the legal system, but only as a temporary solution.⁶¹ This is consistent with the authority given for the appointment of judges, where the original judges (legitimately) refuse to act under the occupant.⁶²

Further, the “administration of justice” in Article 64 would facilitate interim measures to ensure the continuation of the domestic judicial structure where affected by the occupation (or preceding armed conflict), for example by appointing new judges or recalling former judges, or setting up special courts, so long as municipal

⁵⁹Israeli National Section of the International Commission of Jurists, above n9, p38, citing in support of point (b) the case of *Hilu v Government of Israel* (1973) Vol 27, Part 2, *Piskei Din*, summarised in English in (1975) 5 Isr YBHR 384.

⁶⁰Similarly in the Gaza strip and in the Sinai, indigenous Palestinian jurists were appointed to the place of the former Egyptian court: Edi Gnesa, *Die von Israel besetzten Gebiete im Völkerrecht: Eine besetzungsrechtliche Analyse*, Schweizer Studien zum Internationalen Recht Band 25, Zürich, 1981, p141.

⁶¹Israeli National Section of the International Commission of Jurists, above n9, p30. This practice is supported by the Thrace Court of Appeal who held that Article 43 of the Hague Regulations allowed the occupant “provisionally to establish courts. These are competent to perform the functions of national tribunals.” This is in the course of his obligation to ensure the regular functioning of the administration of justice including if the national judges leave the country or refuse to act: *L v N (Bulgarian Occupation of Greece)* [1947] Ann Dig, Case No 110 (Thrace Court of Appeal, 21/1947), at 243. The element of provisionality must be emphasised in this judgment – they are intended for the duration of the occupation only.

⁶²Article 66, Geneva IV.

law is applied in accordance with domestic systems.⁶³ The limit is that such changes cannot be directed to fundamental alteration of the domestic system, nor can they purport to be permanent measures. These forms of intervention, within these limits, are premised on the existence of a reasonably sufficient domestic administration of justice. Existing practice seems to consider such a system to include a hierarchy of courts, including appeal courts, staffed with judicial personnel and equipped with copies of the law. It gives voice to the Article 64 requirement, embodied in the words “necessity for ensuring the effective administration of justice” – which does not mandate the facilitation of access to the full range of municipal courts, simply a system reflecting the primary characteristics of those courts where they are inaccessible during occupation.

3.3 Creating the Domestic “Administration of Justice” Outside Extant Municipal Law and Structures

Kelly argues that Article 64(2), Geneva IV, is permissive as regards the “administration of justice” and broad in its scope of application, allowing the occupant to take action in case of lacunae in domestic law or where the existing structures for the administration of justice are dysfunctional or unreliable in the prevailing security climate.⁶⁴ The effect of Geneva IV, he says, would be to permit the occupant, at their discretion, to intervene “selectively at points of weakness, establish an ad hoc legal regime or leave all matters concerning the civilian population to existing and functioning legal regimes.”⁶⁵ The only limitation on this view would be the explicit prohibition on the occupant applying its own law or legal system to the occupied area.⁶⁶ State practice to the contrary, for example Israel in

⁶³Pictet, above n12, p336.

⁶⁴Kelly, above n9, para 537.

⁶⁵Kelly, *ibid*, para 539-40. In the *Justice Trial*, for example, the United States Military Tribunal constituted under *Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, entered into force 20 December 1945 (“*Control Council Law 10*”), itself a product of occupation, found that German municipal law on treason could not be applied in the unlawfully annexed part of occupied Poland to acts committed by Polish nationals. To do so was an international crime. Nazi authorities had termed the offence *Kriegsverrat*, defined it as all acts detrimental to occupation forces, and administered it through certain Special Tribunals: *Justice Trial*, Opinion and Judgment, p1028.

⁶⁶Von Glahn, above n9, p94.

East Jerusalem and the Golan Heights,⁶⁷ can be distinguished on the grounds that the occupant's law was applied pursuant to a purported annexation of the territory, itself unlawful.⁶⁸

There are two problems with Kelly's interventionist view. Firstly, where practical shortcomings affect the *administration* of justice, for example dysfunctionality as a result of occupation, absence of judicial staff or inadequacy (but not necessarily perceived inefficiency) of facilities and record-keeping, Article 64 is not permissive as regards intervention. Instead, it mandates it under the guise of a "necessity" to maintain the administration of justice. In circumstances where the status quo is preserved "subject to the necessity" for efficacy, it is difficult to justify a permissive view of intervention. Article 64 must be seen as imposing an obligation to intervene, but in limited circumstances. Although Kelly takes the opposite view, it is the mandatory strictures of occupation law which have been said to dissuade the public adoption of it in interventions, in favour of the different rules applicable under authority of the UN Security Council. This is the subject of the next chapter. Secondly, Article 64 does not authorise permanent and far-reaching change to judicial institutions in pursuit of justice or the rule of law. Kelly's middle course of establishing ad hoc domestic legal regimes, beyond the specific authority to create occupation courts to hear security offences, goes beyond the current state of the law.

State practice to the period of the CCCI-K addresses judicial intervention through establishing ad hoc tribunals for 'transitional justice,' tolerance of or acquiescence in the formation of extra-judicial 'courts' by powerful groups in the occupied society (although not actively interventionist, imposing such a requirement would be the corollary of recognising rights or obligations to intervene positively in the 'rule of law'), or establishing parallel administrative tribunals dealing with legal concerns other than criminal justice. The final means imposes the greatest level of direct judicial intervention: the creation of altogether new courts, for example

⁶⁷The *Law and Administration Ordinance (Amendment No 11) Law 1967* permitted the extension of Israeli legal jurisdiction into any area "of Eretz Israel" prescribed. The following day East Jerusalem was prescribed, effecting annexation, by *Administrative and Judicial Order No 1*. Israeli law was applied to the Golan Heights via the *Golan Heights Law* (1981): see Allan Gerson, 'Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14 *Harv Intl LJ* 1, at 11.

⁶⁸*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, adopted by UN General Assembly Resolution 2625 (XXV) (1970), UN Doc. A/5217 25 GAOR Supp (No 28) (1970); UNSC Resolution 242 (1967) in the Israeli/Palestinian context.

introducing a federal court to a regionally-organised criminal justice hierarchy. These are considered in turn.

3.3.1 *Establishing Ad Hoc Tribunals to Administer Transitional Justice*

In the significant occupations following deposition of a regime said to be unlawful or unjust in Germany (1945, although in different circumstances in 1918), Japan (1945) and Iraq (2003), the occupant has taken measures to impose accountability for regime crimes, particularly but not only against the forces of the eventual occupant. However, in the case of Germany and Japan the measures were purportedly ‘international,’ dealing with international crimes including the crime of aggression, genocide, war crimes and crimes against humanity through the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMTFE). This is a different justification to the effort of an occupant to exercise an occupational, or would-be municipal, authority to try crimes.

In Iraq, the UN Security Council called generally for “accountability” for the crimes of the Saddam Hussein regime in Resolution 1483,⁶⁹ but did not employ its own powers to establish an ad hoc international tribunal, with or without state consent.⁷⁰ Partly in response to Resolution 1483, partly to facilitate the request of the Iraqi Governing Council and partly “to prevent any threat to public order ... and to promote the rule of law,” the CPA delegated authority to the Governing Council to establish a Statute for an ad hoc Special Tribunal.⁷¹ However, the proposed statute was attached to CPA Order 48, along with limitations on the nationality of possible defendants.⁷² Most importantly, while in occupation, the CPA was to “prevail” in case of conflict between the Governing Council, the CPA and/ or the Iraqi Special Tribunal.⁷³ Similar methods of direction to the Japanese Imperial Government were generally employed by the occupants of Japan in 1945 through a preference for indirect rule.⁷⁴ As the occupant holds de facto administrative authority pending

⁶⁹Prefatory remarks, UNSC Resolution 1483 (2003).

⁷⁰Compare the International Criminal Tribunals for the Former Yugoslavia and Rwanda, established by UNSC Resolution 827 (1993) and 955 (1994), respectively.

⁷¹Prefatory remarks and section 1, *CPA Order 48 – Delegation of Authority Regarding an Iraqi Special Tribunal*, entered into force 10 December 2003 (“*CPA Order 48*”).

⁷²Iraqi nationals or residents only: section 1, *CPA Order 48*.

⁷³Section 2(3), *CPA Order 48*.

⁷⁴For example, the Imperial Government was “hereby ordered” to purge the public service of militaristic nationalists: General Headquarters of the Supreme Commander for the Allied Powers:

transfer of sovereignty to the reversioner or new sovereign, any interim or puppet government must lack capacity to take such action on a permanent legislative basis, and in any case, is likely in fact to be acting under the dictation of the occupant. By comparison, after toppling his regime in Cambodia, the intervening Vietnamese authorities handed over to an indigenous administration, whose first act was to establish a limited Special Revolutionary Court to try Pol Pot and Ieng Sary for genocide.⁷⁵

Despite the delegation, the Iraqi Special Tribunal was purportedly an instrument of occupation law. Without specific authority of the Security Council to create the tribunal, the CPA asserted, when dealing with the Governing Council, that occupation law permitted it act to maintain order, which is undoubted, and to “promote the rule of law.”⁷⁶ However, it has been demonstrated that occupation law is disinterested in the rule of law as popularly theorised, and accommodates the need for legal self-ordering. The appeal to security suggests that the Geneva IV acceptance of extraordinary military courts for security related offences is indicative of a broader right to create extraordinary courts for security-related purposes. This is part of the general relationship between the rule of law, judicial intervention under occupation and security. However, not unlike the CCCI-K, the IST was beset by security problems, including the assassination of judicial and legal participants.⁷⁷

If the purpose of the occupation court is to improve security by self-seeking transitional justice, then this seems not to be borne out in practice. In addition to the

Memorandum for Imperial Japanese Government, Subject: Removal and Exclusion of Undesirable Personnel from Public Office, SCAPIN-550, 4 January 1946. Further, the Imperial Government was directed to abrogate certain laws: General Headquarters of the Supreme Commander for the Allied Powers, Memorandum for: Imperial Japanese Government. Through: Central Liaison Office, Tokyo. Subject: Removal of Restrictions on Political, Civil, and Religious Liberties, SCAPIN-93, 4 October 1945.

⁷⁵Decree Nr 1 (15 July 1979), issued by the Conseil populaire de la Révolution du Kampuchea.

⁷⁶Prefatory remarks, *CPA Order 48*.

⁷⁷For example, the assassination of defence counsel, Saadoun Sughaiyer al-Janabi and Adil Muhammad al-Zubaidi, on 20 October and 5 November 2005 respectively led to the suspension of proceedings until 5 December and then again until 21 December: *UNAMI Human Rights Report 1 November – 31 December 2005*, para 15, available at <http://www.uniraq.org/documents/HR%20Report%20Nov%20Dec%2005%20EN.PDF>, viewed 20 April 2008. Another defence lawyer, Khamis al-Obaidi, was abducted on 22 June 2006, and later found murdered: *UNAMI Human Rights Report 1 May-30 June 2006*, para 20, available at <http://www.uniraq.org/documents/HR%20Report%20May%20Jun%202006%20EN.pdf>, viewed 25 April 2008. The body of a defence assistant, Abdul Monem Yassin Hussein, was found in Baghdad on 3 September 2006, and the brother of the Chief Prosecutor was shot dead by gunmen in front of his family on 16 October: *UNAMI Human Rights Report 1 September-31 October 2006*, paras 39-40, available at <http://www.uniraq.org/documents/HR%20Report%20Sep%20Oct%202006%20EN.pdf>, viewed 26 April 2008.

delays, the trial came under significant criticism internationally, including from the UN's Special Rapporteur on the Independence of Judges and Lawyers, for its lack of procedural fairness (in part a response to the security situation), lack of independence and "its doubtful legitimacy and credibility" deriving from the fact of an occupation seen as illegal, appointment of judges by the occupant and foreign funding.⁷⁸

3.3.2 *Acquiescence in, or Failure to Suppress, Extra-Judicial 'Courts'*

A clearer example of the impact of security is an occupant's acquiescence in, or failure to eliminate, extra-judicial 'courts.' This failure amounts to a significant failure to restore and maintain public order, required by the Hague Regulations and Geneva IV, because their existence and operation with impunity is symptomatic of a lack of control and absence of authority. The persistence of militia-backed summary courts outside the formal judicial structure emerged strongly during the Coalition occupation in Iraq. They were especially prominent in 2004 as instruments of Sadrist Shi'ite militias in Baghdad, asserting a right to try, sentence and execute 'collaborators,' and relying on Shariah law.⁷⁹ Efforts to restore security generally will meet the obligation on the occupant to restore order, because they will of themselves tend to preclude the emergence or continuation of such bodies during the occupation.

However, the occupant should take care in the course of such operations that the formalising of domestic systems of adjudication in pursuit of a rule of law relationship are not ended. There is no requirement for a domestic system of law that it not include elements of community justice, such as allowing forms of tribal justice to be administered in Iraq or recognising various community justice processes in Australia.⁸⁰ The difference should be apparent on the facts: systems which seek to form a rule of law relationship will have discernible instrumental rules on which they operate, including recognition of sources of law (for example of a religious or tribal

⁷⁸Mr Leandro Despouy, reported in Agence France Press, 'Saddam Trial Not Independent or Impartial: UN Official,' 7 November 2006, available at <http://www.abc.net.au/news/newsitems/200611/s1782551.htm>, viewed 13 October 2009.

⁷⁹Such 'trials' were reported to be regular: Melinda Liu and Babak Dehghanpisheh, 'Questions of Justice: The Abu Ghraib Abuses are Part of a Deeper Crisis,' *Newsweek* (US Edition), 17 May 2004, <http://www.keepmedia.com/Register.do?oliID=225>, viewed 22 February 2009.

⁸⁰For example, taking account of Aboriginal community sentencing or 'payback' in formal judicial sentencing: see Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

leader applying revealed law or recognisable tribal tradition), whereas unlawful courts will operate on an ad hoc basis.

Other special or extra-judicial courts may exist at the commencement of occupation. The Allied occupation of Germany in 1945 and the Coalition occupation of Iraq shared a concern in eliminating special courts established by the previous regime – in Germany, the notorious People’s Court, in Iraq a range of special and ad hoc courts which were outside, and not part of, the traditional court hierarchy and primarily dealt with internal and national security.⁸¹ Unsurprisingly, the existence of such courts undermines the objectivity of the judiciary (especially where trained judges are not appointed to oversee the trials), and destroys public confidence in the administration of justice.⁸² In these cases, the competence of the occupant to intervene where necessary for the “administration of justice,” as well as to restore public order and safety, would permit the immediate suspension of these courts. It may not, however, allow their permanent abolition pending the revitalisation of sovereignty, since that would be effecting a *fait accompli* for the reversioner.

3.3.3 Court Interventions Unrelated to Criminal Justice

Typically, occupants will establish some form of administrative claims board to resolve claims against themselves for damages caused by the occupation. They may also seek to intervene as necessary for the administration of justice or to restore *l'ordre et la vie publique* in the civil court process. The persistence of unresolved land and property disputes, which may have arisen out of the occupation, can be a significant destabilising influence on society, as can economic uncertainty, and

⁸¹See for example United States Institute of Peace, *Special Report 104: Establishing the Rule of Law in Iraq*, April 2003, pp5-6, and Stanley Roberts, ‘Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq’ (2004) 33 *Hofstra LR* 367, at 383. They included, after 1968, a system of separate military courts (*Mahkamat al-Khasa* and *Mahkamat al-Da’imiyah*, which paralleled the civilian structure with the first court for misdemeanours, the second for “more serious offences,” and above them a Military Court of Cassation), the *Mahakim Qi-wa al-Amn al-Dakhili* (internal security courts) and, most infamously, the Revolutionary Court, which dealt with national security and corruption and was staffed by non-legally trained party members. There was no appeal from the court and it was not bound by rules relating to habeus corpus. Its president at the time of US intervention was Awad Hamad al-Bandar, who was convicted of crimes against humanity and sentenced to death: *Case Nr1/9 First/2005 al-Dujail Case*, Iraqi High Tribunal, 2006 (“*Dujail Trial*”), judgment translated unofficially from Arabic to English by Mizna Management LLC, available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>, viewed 6 October 2009. See further Roberts, *ibid*, at 384-5.

⁸²Roberts, *ibid*, at 385.

'justice reconstruction' should include measures to deal with them.⁸³ Temporary measures directed to the resolution of the latter would be permitted under Article 64, Geneva IV.⁸⁴ It is also consistent with the criminal justice approach of allowing intervention to permit judicial administration upset by fact of occupation.

Although not required by any provision of customary or treaty law, the creation of claims tribunals is common in formalised occupations, and in armed conflict more generally. This is in some ways a pragmatic response to dispute resolution as international law not only does not allow, but in fact prevents, the use of the domestic court structure against the occupant, since the occupant is not subject to the domestic legal regime.⁸⁵ Nor is it always possible to allow the occupied population access to the occupant's own courts to resolve claims.⁸⁶ There is no mandatory form, since such processes are not mandated, but administrative systems often include an administrative review board effectively providing an appeal against assessment.⁸⁷

These changes are to be distinguished from further intervention in the organisation of administrative review in occupied territories. Temporary measures to resolve the paralysis of administrative boards under the domestic structure, for example the inherent jurisdiction in West Bank local courts and tribunals to review Jordanian government administrative decisions cannot be exercised since the Jordanian government is not in authority and the Israeli occupants are not subject to

⁸³Michael Kelly, 'Military Force and Justice' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p229), p250.

⁸⁴For example, the establishment of Labour Courts to settle labour disputes and the 'reorganisation' of Administrative Courts in post-1945 occupied Germany: *Control Council Law 21: Law Concerning German Labour Courts*, CONL/P(46)23(final), Berlin, 30 March 1946, and *Control Council Law 36: Administrative Courts*, CONL/P(46)67 (final), Berlin, 10 October 1946.

⁸⁵Von Glahn, above n9, p3; and see also Israeli National Section of the International Commission of Jurists, above n9, p13 and the references there cited.

⁸⁶In Canada, for example, no domestic action can be brought for the benefit of enemy aliens: *Dangler v Hollinger Gold Mines* (1915) 34 OLR 78 (High Court) and *Bassi v Sullivan* (1914) 32 OLR 14 (High Court). By contrast, access to Israeli Civil Courts is permitted for, inter alia, claims for damages caused by the IDF: Israeli National Section of the International Commission of Jurists, *ibid*, p16.

⁸⁷For example in the West Bank, a scheme was introduced in which claims were decided by the Staff Officer Claims, with an appeal to the Claims Appeal Board: *Order Concerning Claims 271/1968*. This scheme is questionable in some respects because the Staff Officer Claims has purportedly been given administrative review powers under Jordanian law, amending the limited ex gratia scheme for tort liability under the *Civil Wrongs Ordinance 73/1953*. Since the occupant is a de facto temporary administrator and not the government of the day with full domestic regulatory authority, this kind of activity is probably beyond its competence, notwithstanding the assertion that the change was not permanent in nature.

the domestic tribunals.⁸⁸ The Israeli administration created Appeal Boards were to be chaired by civilian lawyers expert in the relevant field of jurisdiction, including abandoned and government property, customs and excise, acquisition of land for public purposes, income tax and pensions.⁸⁹ This is a pragmatic measure for the ongoing administration of disputes, rather than directed to a higher rule of law principle.⁹⁰ Similarly, temporary intervention in the organisation of responsibility for legal matters within the domestic structure may be permissible if necessary for the preservation and pursuit of claims.⁹¹ The purpose of such interventions must be clearly pragmatic and facilitative, and most significantly limited to the occupation period, to be justified under occupation law.

3.3.4 *Establishment of Altogether New Permanent (Criminal) Courts*

A similar basic approach applies to the creation of new courts or the attempted expansion of military jurisdiction into the civil sphere, where it is not in response to urgent structural shortcomings caused by the occupation itself. Where the new courts are in fact military courts, purportedly granted broad criminal jurisdiction under municipal law, then the occupant has acted contrarily to the words of Article 65, Geneva IV, that the occupant shall not exercise retrospective criminal jurisdiction, and the World War Two principle that the capacity of the occupant does “not comprise criminal acts committed by the local population that had no military aspect and did not affect the safety of the occupation army.”⁹² It also poses a rule of law problem, since military judges remain susceptible to military discipline and command, and their independence in the cause of an occupied people may not be

⁸⁸Israeli National Section of the International Commission of Jurists, above n9, p16.

⁸⁹Ibid, p17.

⁹⁰Compare the Palestinian complaint that the process undermined the judicial structure to the detriment of the rule of law: Niall McDermott, ‘Introduction’ to Shehadeh and Kuttab, above n40, p8. The work of the Israeli National Section of the International Commission of Jurists, above n9, was published in direct response to this work, taking the view that the intervention was to strengthen the rule of law.

⁹¹For example, authority to conduct international litigation in claims involving Iraq was moved from the Legal Department of the Office of the Council of Ministers to the Ministry of Justice, where it would be conducted in “coordination” with the CPA: section 2, *CPA Order 32 – Legal Department of the Ministry of Justice*, entered into force 4 September 2003. The requirement for ‘coordination’ may overstep the bounds of occupation law, depending on the character of control in individual cases, since the occupant cannot have the legal capacity to conduct foreign affairs on behalf of the occupied territory, a characteristic of sovereignty.

⁹²*Public Prosecutor v X* [1919-42] Ann Dig Supplementary Volume, Case No 160 (Supreme Court, Appellate Division, Norway, 22 June 1940); Butovsky, above n35, at 226. Based on this authority and the wording of Article 64, Butovsky considers the jurisdiction of the West Bank Military Courts “questionable.”

apparent.⁹³ Israel has attempted to do so in the West Bank, giving its occupation military courts criminal jurisdiction for offences prior to the commencement of the occupation, or offences between civilians.⁹⁴ Butovsky rejects this as “improper” because it effectively ousts local criminal jurisdiction, which Article 64 clearly preserves; he would allow jurisdiction only on a case by case basis where Israeli citizens or security were involved.⁹⁵

The Coalition creation of the CCCI-K in Iraq in June 2003⁹⁶ is the most adventurous example of this kind of intervention, evidence of the growing modern trend towards rule of law intervention as a good to be sought. It is in essence a federal criminal court, imposed on a traditionally regional-based criminal justice system, shown in Figure 1.⁹⁷

The civil structure was similar, including the initial *Mahkamat al-Bidayah*, 18 regional Appeal Courts and at the top the same *Mahkamat at-Tamyeez*. Religious courts for personal status remained separate.⁹⁸

⁹³Butovsky, *ibid*, at 228, discussing *Military Prosecutor v Zuhadi Salah Hassin Zuhad* (1968) 47 Intl LR 490 (Israeli Military Court, Bethlehem, 11 August 1968).

⁹⁴West Bank military courts have concurrent but primary jurisdiction over all criminal offences in the West Bank dated before or during the occupation, although they focus on security offences and accusations against Israelis: Article 2, *Order Concerning Jurisdiction in Criminal Offences* 30/1967 and section 7, *Order Concerning Security Provisions* 378/1970, as affected by section 2, *Order for Closing Files* 841/1980. Their convictions and sentences must be authenticated by, and can be varied, quashed or upheld by, the Area Commander, and there is no right of appeal: Article 50, *Proclamation* 378.

⁹⁵Butovsky, above n35, at 226.

⁹⁶*CPA Order 13*; see also Spinner, above n16.

⁹⁷Criminal and civil *Nizamia* courts based on administrative districts replaced a Shariah court system in 1880. At about the same time the Ottoman *Criminal Code* was introduced, which was “mostly copied” from the contemporary French code, giving what is now modern Iraq an inquisitorial system of law based on provincial organisation. The introduction of circuit or district courts more familiar to Western jurists continued via the *Hokkam a’Solh (Magistrates) Act 1913*, and the proclamation of the Baghdad Court of First Instance, with civil and criminal divisions, in 1917. All these courts, in addition to their own Appeal Courts, allowed appeals to the Istanbul Court of Cassation. The underlying organisational principle remained the administrative provinces: Chief Judge Medhat al-Mahmoud, above n43, pp7-8. The administrative regions remained the same under Saddam Hussein, although the Ba’ath party made some structural changes or omissions to affect the equal administration of justice in the extant regions, such as in Maysan and Muthanna provinces as discussed above: Roberts, above n81, at 393.

⁹⁸United States Institute of Peace, above n81, April 2003, pp5- 6. Each criminal court included an Investigative Panel, comprising judges, who would investigate and dismiss or refer cases to the Trial Panel, which, where large enough, could also sit as an Appeal Court.

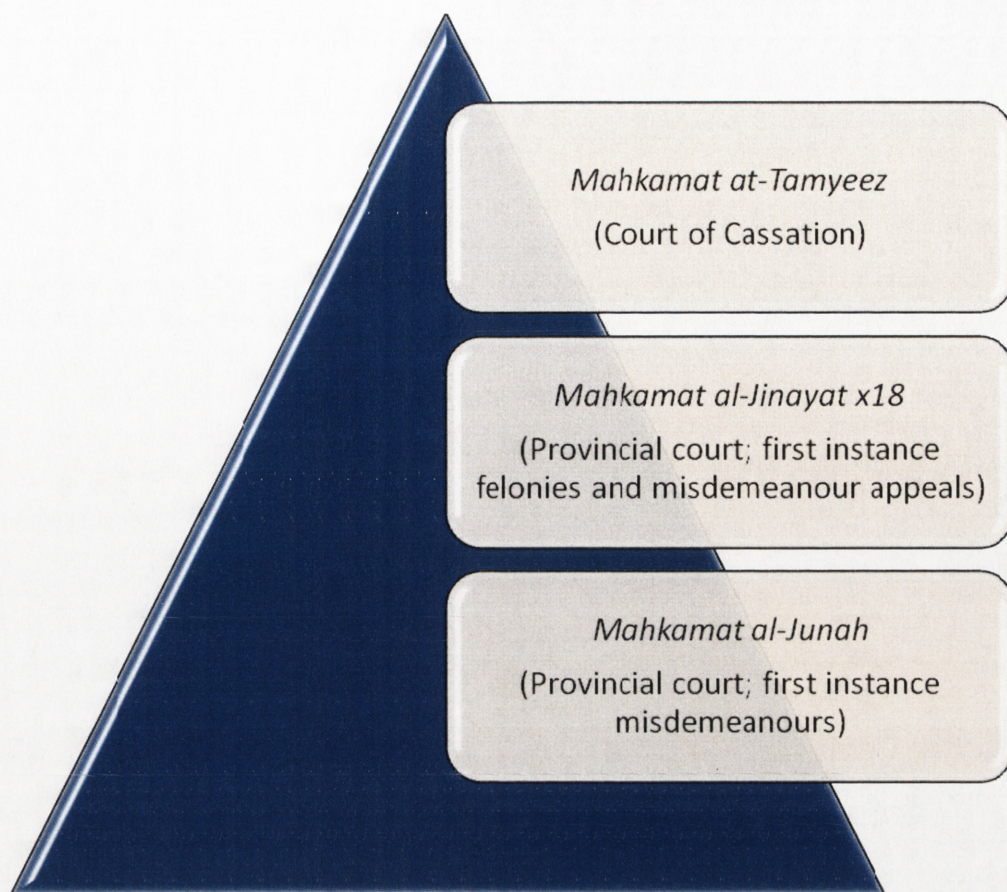


Figure 1: Iraqi Criminal Justice Hierarchy Prior to Coalition Intervention, 2003

The CCCI-K followed the internal organisation of a civil law domestic criminal court with investigative and trial chambers, staffed with Iraqi judicial officials, which were to operate in accordance with local law as modified by the CPA.⁹⁹ It was subject to the Court of Cassation, “in accordance with the applicable law,”¹⁰⁰ although it is not quite clear how this was expected to apply to a novel federal criminal court, and all felony appeals lay to that court.¹⁰¹ The CCCI-K was given “nationwide discretionary ... jurisdiction over any and all criminal violations,” including the jurisdiction of all local felony and misdemeanour courts, but was directed to “concentrate” on certain serious criminal offences arising from

⁹⁹Sections 1-4, *CPA Order 13*. However, the Investigative Court in both chambers was limited in its civil jurisdiction to victim compensation claims associated with a criminal proceeding.

¹⁰⁰Section 9(2), *CPA Order 13*.

¹⁰¹Section 21, *CPA Order 13*.

insurgency operations or besetting occupation authorities.¹⁰² It could seize itself of a matter on the application of the defendant or by reference from a local court,¹⁰³ placing it effectively between the Court of Cassation and the regional criminal courts in the judicial hierarchy, although it included a Court of First Instance. This required consequential amendments, including CPA direction to local courts to comply with CCCI orders to carry out certain judicial functions¹⁰⁴ and innovatively allowing evidence to be taken by video conferencing or a similar remote method.¹⁰⁵

The CPA argued that occupation law, comprising its “duty to restore and maintain order and its right to ensure its security and fundamental standards of due process” and its scope to act “on behalf, and for the benefit of the Iraqi people,” authorised this kind of intervention.¹⁰⁶ Statements to the press also relied on “the urgent security needs of the people of Iraq and Coalition Forces.”¹⁰⁷ Occupation law, however, has specifically considered the security needs of the occupant and the occupied society in allowing the creation of extraordinary military courts for the duration of the occupation and mandatory interim measures to ensure the administration of justice.¹⁰⁸ What the CCCI-K sought to establish was a much broader claim of security-based authority to create an altogether new system of indigenous criminal justice.

However, the Coalition, Iraqi leaders and the press assessed the CCCI-K in rule of law rather than security terms, suggesting that the court was innovative and beneficial as “a fair tribunal that gives defendants due process.”¹⁰⁹ The new court was intended to foster better transparency through open trials, leading, it was said, to

¹⁰²Section 18, *CPA Order 13*.

¹⁰³Section 18(3-5), *CPA Order 13*.

¹⁰⁴Primarily investigative functions such as witness or crime scene examination: section 8, *CPA Order 13*.

¹⁰⁵Section 10(6), *CPA Order 13*.

¹⁰⁶Prefatory remarks, *CPA Order 13*.

¹⁰⁷Office of the Administrator of the Coalition Provisional Authority, Baghdad, Iraq, *Public Notice Regarding the Creation of a Central Criminal Court Of Iraq and Adjustments to the Criminal Procedure Code*, 18 June 2003.

¹⁰⁸This reliance on security can be compared to Yugoslav occupiers in Hungary, who were specifically held to be permitted to “create new organs in so far as this was necessary for safeguarding public order and the economic well-being of the territory.” *Kemeny v Yugoslav State* [1927-8] 19 Intl LR 614, and see Butovsky, above n35, at 229.

¹⁰⁹Spinner, above n16; Hashim al-Shibli, Minister of Justice stated that “no one is above the law in the new Iraq,” quoted in CPA Office of Strategic Communications Press Release, ‘Iraq’s Central Criminal Court Convicts Two Oil Smugglers,’ 14 October 2003, http://www.cpairaq.org/pressreleases/20031014_OCT-14-Conviction.htm, viewed 23 March 2008.

domestic legitimacy.¹¹⁰ In a telling reflection on the rule of law relationship, however, the court was rejected by the public because of its US backing, “American-style justice,” and administration of CPA Orders instead of Iraqi law, notwithstanding the local staffing and imposition of international standards on the independence of the judiciary.¹¹¹ At its most basic level, some Iraqi judges objected to the view that judicial reconstruction or training was required at all, especially from an occupant.¹¹² This is to be compared with the ex post facto acceptance of the court and its process as valid and binding by the Iraqi authorities on conclusion of the occupation, in face of continued public disquiet indicative of a normative legitimacy problem.¹¹³ Western criticism of the measurable outcomes of the court was heavier again, addressing minimal case resolution rates, delays between detention and trial and, conversely, the rapid conduct of trials and sentencing once commenced.¹¹⁴ Some of these criticisms were in fact about shortness of trials in the inquisitorial process generally, others explicable by the short Iraqi workday (9am-2pm),¹¹⁵ slow materialisation of promised computer systems for court registries and national databases and lack of facilities.

Despite its intended rule of law effect, the actual impact of the CCCI-K on the rule of law in Iraq was dramatically affected by security when measured by practical outcomes. For example, despite the CPA direction for open trials in accordance with Iraqi law, the public was kept from hearings because of security

¹¹⁰Giordono, above n21.

¹¹¹The CCCI bench was directed to act “independently and impartially,” and without discrimination on the basis of “race, nationality, ethnicity or religion and in accordance with their impartial assessment of the facts and their understanding of the law, without improper influence, direct or indirect, from any source,” and judges were barred from other paid employment or political positions: section 6(1-3), *CPA Order 13*. Section 8 provided for the disqualification of judges by the Administrator from particular matters in case of actual or apprehended breach of these requirements. Disqualification could be directed or at the judge’s request to be excused, except that it was to be permission of the CPA Administrator for the duration of the occupation: section 8(4). For public perceptions of the CCCI-K, see Spinner, above n16; Giordono, above n21.

¹¹²Jim Krane and Donna abu-Nasr, ‘Iraq gets court reform; US soldier dies,’ *The Times Leader* (Pennsylvania, USA), <http://www.timesleader.com/mld/timesleader/6103225.htm>, posted 17 June 2003, reproduced at http://www.redorbit.com/news/general/2838/iraq_gets_court_reform_us_soldier_dies/, viewed 23 March 2008.

¹¹³See further Chapter Four, section 4.3.1 et seq.

¹¹⁴Reportedly, only 37 cases involving 55 defendants were finalised in 2003: American Forces Press Service, ‘Iraq’s Central Criminal Court Convicts Insurgents,’ Washington, 2 August 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9B06E4DD1F3DF932A3575BC0A9629C8B63&sec=&spon=&pagewanted=all>, viewed 13 October 2009.

¹¹⁵Jeffrey Gettleman, ‘The Reach of War: The Law; Making Wheels of Justice Turn in a Chaotic Iraq,’ *The New York Times*, 1 August 2004, <http://query.nytimes.com/gst/fullpage.html?res=9B06E4DD1F3DF932A3575BC0A9629C8B63&sec=&spon=&pagewanted=all>, viewed 13 October 2009.

concerns.¹¹⁶ Threats of assassination and “political interference” were also reported, by Iraqi and Coalition forces alike, as a significant influence on judicial outcomes, exacerbated by the lack of secure housing for judges.¹¹⁷ The system of administrative detention, even following acquittal by the CCCI-K has been introduced above. Rather than fostering security, the court was itself unable to function effectively because of the lack of security under occupation – a failure of the occupant to restore order and *la vie publique*.

3.4 The Character of the “Administration of Justice:” Authority to Intervene in Judicial Personnel Policy

Intervention in the domestic judicial structure is not limited to the court hierarchy itself, but can be equally affected by the intervention in the judiciary through personnel policy. In perhaps the order most consistent with the emphasis of Article 43 on the restoration of the last position consonant with the administration of justice, *CPA Order 35: Re-Establishment of the Iraqi Council of Judges*, took effect on 15 September 2003.¹¹⁸ Under Saddam Hussein, the judicial system had been under Ministerial control resulting in direct executive influence on the judiciary.¹¹⁹ The Order ‘recognised’ that “a key to the establishment of the rule of law” is a free and independent judiciary.¹²⁰ However, historical experience also demonstrates that

¹¹⁶Section 10(4), *CPA Order 13*, except for Felony Court verdicts which were always to be public (section 10(5)); Moss, above n21.

¹¹⁷At December 2006, only 12 of the 30 judges had been found secure accommodation in the Green Zone: Moss, *ibid*.

¹¹⁸However, the level of detail in *CPA Order 35 – Re-Establishment of the Council of Judges*, entered into force 15 September 2003, is surprising for a regulation purporting to restore a system that was, including details of the relationship of the Council to the Iraqi executive, its budgetary, property and staffing organisation, its permitted “administrative oversight” of the Iraqi judicial system except the Supreme Court, misconduct investigations, appointments and promotions, and the meetings, composition and appeal structure of the Disciplinary and Professional Standards Committee: sections 2-6. The appointments authority included power to “assign or reassign judges and prosecutors to hold specific judicial and prosecutorial posts as provided for in the *Law of Judicial Organisation 160/1979* and the *Law of Public Prosecution 159/1979*.” section 3.

¹¹⁹The *Ministry of Justice Act 101/1977* had brought the Council of Judges, the supervisory judicial body, for the first time under Ministerial control, “ending the independence of the judiciary” under any true separation of powers. The restructure was reinforced in the *Law of Judicial Organisation 160/1979* and *Law of Public Prosecution 159/1979*. In 1970, shortly after the Ba’athist seizure of power, Iraq had adopted its fifth interim Constitution since 1925, which gave “ultimate authority to the Ba’ath Party: Medhat al-Mahmoud, above n43, pp22, 33.

¹²⁰See also prefatory remarks, *CPA Memorandum 12 – Administration of Independent Judiciary*, entered into force 8 May 2004 (“*CPA Memorandum 12*”), which drew on the “laws and usages of war and relevant UN Security Council resolutions,” including Resolutions 1483 and 1511 (2003). CPA

authority to control or influence judicial personnel policy has a significant impact on the character of the resulting judicial system.¹²¹ Further, the assertion of an interest in the rule of law goes substantially beyond the concerns of occupation law; while it correctly asserted that arrangements implemented during the Saddam regime were “suspended”¹²² rather than abolished, the reorganisation of the Council of Judges was accompanied by direct CPA action in the removal and (re)appointment of judicial officers. This was the most recent episode in a twentieth century emphasis on the purging of judiciaries said to be involved in, or tainted by, internationally criminal regimes by occupants.

3.4.1 *Removal of Judicial Officials*

Article 54, Geneva IV, permits occupants to “remove public officials from their posts,” for reasons of their own, although they may not alter the status, penalise or coerce judges who refuse to act under the occupant for reasons of conscience.¹²³ This right is limited to the period of occupation.¹²⁴ There is sense in the pragmatic Israeli argument that there must be power to appoint replacements for judges who lawfully refuse to act, or to fill vacancies,¹²⁵ which flows from the Article 64 “necessity” of maintaining the administration of justice. In the West Bank, for example, 31 of 39 judges at the time of occupation refused to act under Israeli

Memorandum 12 was specifically intended to implement the “independent judiciary as provided for in CPA Order No. 35 and the Law of Administration for the State of Iraq for the Transitional Period:” recitals and see section 1.

¹²¹It is significant in this respect that the existence of an “independent judiciary,” in terms of independence from the executive, has been traced to the British occupation under mandate of the area which forms modern Iraq: United States Institute of Peace, above n81, p5.

¹²²For example, section 6(2). Similarly, the Council of Justice, the Ba’athist replacement for the Council of Judges, was not abolished but stripped its jurisdiction over judges and prosecutors: section 6(2). Compare Israeli amendments to Jordanian Law No 2 on the *Independence of the Judiciary* including the replacement of the Judicial Council by a committee appointed by the Area Commander: Shehadeh and Kuttub, above n40, p34, citing amendments in *Military Order 310*. A range of other civil registry functions were conferred on members of the occupation, including the powers of the Bar Association to conduct, supervise and accredit legal training: *ibid*, pp29-30 and the references there cited.

¹²³Pictet, above n12, p308.

¹²⁴Butovsky, above n35, at 229-30.

¹²⁵Israeli National Section of the International Commission of Jurists, above n9, p22; M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, California, 1959, p260; *The Law of War on Land being Part III of the Manual of Military Law*, The War Office, London, 1985, p162, which oddly referred to “judicial functionaries” rather than judges.

administration; without replacement, the judicial system would have been ineffective.¹²⁶

Practice to date consists of dismantling state ideologies deemed contrary to justice, or to international law, including the Allied purges of local German and Japanese officials in 1945 and de-Ba'athification in Iraq. In Japan and Iraq, the instruments authorising removal of officials did not refer specifically to the judiciary, including them merely as part of the body of public officials to be purged.¹²⁷ The Allied Powers in Germany in 1945 had a much more detailed program, specifically identifying for "compulsory exclusion," at number 88 in their list, senior judges, prosecutors and employees employed since 1 March 1933 in certain general courts, and, at number 87, lawyers and judges involved as position-holders in certain named institutions and special (Nazi) courts.¹²⁸

In both Japan and Iraq, civil service purging was conducted through an indigenous authority: the Imperial Japanese Government, under 'orders' to remove officials with "undesirable" views about or membership in organisations concerned with "military nationalism and aggression" in order 'to drive' "irresponsible militarism ... from the world,"¹²⁹ and the Iraqi Governing Council by 'delegation,' and later the Iraqi De-Ba'athification Council, to achieve representative government by removing Ba'ath party members from government.¹³⁰ The Iraqi purge was based

¹²⁶Israeli National Section of the International Commission of Jurists, *ibid*, p23. However, Shehadeh and Kuttab attribute the "low standard" of decisions in West Bank Courts to, *inter alia*, the appointment of inexperienced or insufficiently trained magistrates by Israel: above n40, p44.

¹²⁷In Japan, all civil servants ranked *chokunin* or higher were reviewed: article 3, General Headquarters of the Supreme Commander for the Allied Powers, *Memorandum for Imperial Japanese Government, Subject: Removal and Exclusion of Undesirable Personnel from Public Office*, SCAPIN-550, 4 Jan 1946 ("*Exclusion of Undesirable Personnel*, SCAPIN-550." In Iraq, judges appear to have been included among "the top three layers of management in every national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals)" to be interviewed for removal of full Ba'ath party members: sections 3 and 1, respectively, *CPA Order 1 – De-Ba'athification of Iraqi Society*, entered into force 16 May 2003 ("*CPA Order 1*").

¹²⁸The extensive list of criminal and civil courts included both special courts, such as the party courts and the Volksgerichtshof (People's Court), as well as those in the traditional German court hierarchy, including the Oberlandesgerichte and Landgerichte: article 10(87-8), *Control Council Directive 24: Removal from Office and from Positions of Responsibility of Nazis and of Persons Hostile to Allied Purposes*, 12 January 1946 ("*Control Council Directive 24*").

¹²⁹Prefatory remarks and article 2, *Exclusion of Undesirable Personnel*, SCAPIN-550.

¹³⁰Section 1(1), *CPA Order 1*. Ba'ath party membership, even full membership, has been criticised as failing to recognise the pressure placed on judges even in the traditional court structure both to be members of the Baath party and to give judgments that accorded with the views of the ruling elite. In such circumstances, blanket dismissal removes the entire indigenous judicial corpus: Roberts, above n81, at 380-1, 398. Roberts preferred corruption as a determinant, but its extent has been disputed between judges and lawyers before and during the occupation. Canvassed in 2003-4, lawyers (those

on Ba'ath party membership. Both occupants' instruments dictated in considerable detail the requirements of the purge,¹³¹ and in Iraq, notwithstanding the delegation, the program was initially administered directly by local Coalition Forces.¹³² Later, control over vetting was transferred to a mixed national and international Judicial Review Committee, appointed by the CPA, with broad powers of removal and appointment.¹³³ By contrast, in Germany, the Allies controlled deNazification directly through Control Council Directive 24, intending to remove those who were "more than nominal participants" in Nazi activities and all those "hostile to Allied purposes."¹³⁴

Dismissal of judges might be linked to the occupant's authority to maintain security. The CPA Administrator, for example, relied primarily on it,¹³⁵ while the reference of the Allied occupants of Germany to removing those "hostile" to the occupying forces is a direct appeal to security. Although ultimately the efficacy of purges in assisting security is a question of fact,¹³⁶ since occupation regulations

who had to contribute the funds) thought it a "serious problem," judges disagreed: see Roberts, *ibid*, at 385-6. For the CCCI-K, see Gettleman, above n115.

¹³¹Article 2, *Exclusion of Undesirable Personnel*, SCAPIN-550.

¹³²*CPA Memorandum 1 – Implementation of de-Ba'athification Order 1*, entered into force 3 June 2003, setting up Administrative Review Committees initially comprised of Coalition Forces, but to include foreign civilian investigators and Iraqi professionals "whenever possible:" section 1(2); *CPA Memorandum Number 7 – Delegation of Authority under De-Ba'athification Order No. 1*, entered into force 4 November 2003. Lieutenant-Colonel Craig Trebilcock reports that "common tools" for judicial screening were polling the provincial bar association, local tribal leaders, local business leaders and municipal officials about the reputation of local judges and questioning the judges themselves. He commented that the business community's views were not "reliable to measure judicial ethics and suitability," and was especially subject to sectarian or other motivations. Removals also operated on different provincial procedures, but with varying levels of domestic involvement in 2003 in a "quasi-democratic" system – early success was set-back by the delayed formal vetting process conducted by the CPA in August-October 2003: *Legal Assessment of Southern Iraq: 358th Civil Affairs Brigade After Action Review*, as reported in *CLAMO Rule of Law Handbook*, above n23, pp174-7. By 5 November 2003, 66 judges had reportedly been dismissed: *Global News Wire*, 'Iraq: Judicial Review Committee Dismisses 66 Judges,' 5 November 2003, as cited in Roberts, above n81, at 397.

¹³³*CPA Order 15 – Establishment of the Judicial Review Committee*, entered into force 23 June 2003 ("CPA Order 15").

¹³⁴*Control Council Directive 24*, especially article 1, and see also *Control Council Directive 38: The Arrest and Punishment of War Criminals, Nazis and Militarists and the Internment, Control and Surveillance of Potentially Dangerous Germans*, 12 October 1946.

¹³⁵Prefatory recitation, *CPA Order 1*, which drew on "my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, and the laws and usages of war," pre-intervention human rights abuses, the "grave concern of Iraqi society regarding the threat posed by the continuation of Ba'ath Party networks and personnel in the administration of Iraq, and the intimidation of the people of Iraq by Ba'ath Party officials," and "the continuing threat to the security of the Coalition Forces posed by the Iraqi Ba'ath Party."

¹³⁶Interestingly, allegations emerged in 2004 about on-going or resurgent Ba'athist influence on the CCCI-K and its conviction and sentencing record, as a substantial criticism of the court: Erik Eckholm, 'Iraqi Indicted for Proposal to Open Talks with Israel,' *The New York Times*, 6 Oct 2004,

drawing on security are not justiciable if authorised prima facie, the reliance on it is reasonably conclusive of authority to implement a judicial purge.

Von Glahn, however, concludes that for all judicial and other officials, “the exercise of their authority depends entirely on the express or implied consent of the occupant.”¹³⁷ This is not in keeping with the strict judicial independence required by the rule of law, particularly when von Glahn argues that judges would “logically be subject to any oath of obedience exacted from officials retained in their posts,”¹³⁸ which poses problems for the proponents of such intervention to achieve the rule of law.¹³⁹ For example, the directive establishing the Iraqi Judicial Review Committee unusually asserts “the right of the CPA to take measures for its security, to ensure fundamental standards of due process and to promote the rule of law,” as well as the standard requirement to maintain order.¹⁴⁰ Within itself, this was a system where the Committee was to “operate at the discretion” of the CPA Administrator, whose discretion also controlled the appointment and dismissal of both Iraqi and international Committee members.¹⁴¹ This level of executive control of the appointment and review process is not easily reconcilable with the rule of law properly so called or even with the notion of independence set out in the Order itself.

The permissiveness of von Glahn’s view also highlights a tension between state practice and a consistent interpretation of the capacity of the occupant to introduce ideological change. Re-ideologising the purged civil service after a fashion satisfactory to the occupant, in the case of Germany and Iraq to non-indigenous forms of democracy or the rule of law, is not consistent with the general compulsion on the occupant to preserve the status quo ante. However, where the previous regime engaged in international crimes, including crimes against humanity through judicially-administered discrimination, then there is both a broad responsibility under international criminal law, and a specific authority under Geneva IV, to end that behaviour to the extent within its authority so as not to be itself complicit.¹⁴² The

available at <http://www.nytimes.com/2004/10/06/international/middleeast/06arrest.html>, viewed 10 November 2008; Roberts, above n81, at 369.

¹³⁷Von Glahn, above n9, p136.

¹³⁸Ibid.

¹³⁹For example, Kelly, above n9, generally.

¹⁴⁰Prefatory remarks, *CPA Order 15*.

¹⁴¹Sections 1(2) and 3(1), respectively, *CPA Order 15*.

¹⁴²Common Article 3, Geneva IV.

purge of occupied Japan, for example, was directed to removing those officials complicit to varying extents in an alleged crime of aggression, and in Germany in war crimes and crimes against humanity. The tension emerges not so much in the removal but in the appointment process, particularly where the occupant's domestic constitutional arrangements mandate certain policies.

3.4.2 *Appointment and Re-appointment of Judicial Officials*

The purpose to be achieved by purging and then replenishing the civil service in Germany, Japan and Iraq included, variously, inculcating democratic values, removing militarist views and restoring the rule of law. Achieving this required permanent appointment of new judicial officials, without necessarily seeking local input, and could include a residual power of dismissal in the occupant.¹⁴³ In establishing the CCCI, the CPA conferred powers of judicial appointment on the CPA Administrator, which were mandated to be exercised prior to the transfer of governmental authority planned for 1 July 2004, and established a range of criteria consistent with the de-Ba'athification program and what were seen to be general standards of professional competence and integrity.¹⁴⁴ Critics identified cases where, for reasons not publicly available, the CPA appeared to have appointed unknowns or potentially unqualified people to high profile judicial appointments.¹⁴⁵ Order 13's permanent appointments appear contrary to the previously agreed view that appointments were for the duration of the occupation only. In this case, it appears that the avowed rule of law purpose may have influenced the determination that this be a permanent, in the sense of open-ended appointment, consistent with a formalist view of certainty and predictability and the independence of the judiciary. The intention to create the rule of law under occupation encounters this tension: the rule

¹⁴³For "clear evidence of unlawful or unethical conduct, breaches of the requirements of this Order, or incompetence on the part of the member: section 5(5) and 5(2) respectively, although after the transition to the interim Iraqi government, appointment and removal from office was directed to be "in accordance with the procedures set forth in Iraqi law:" section 5(6), *CPA Order 13*.

¹⁴⁴Section 5(1), *CPA Order 13*, prescribed criteria as follows: judges were to be Iraqi nationals, of high moral character and reputation, have a background of either opposition to the Ba'ath party, non-membership of the Ba'ath party or membership not falling within the leadership tiers described in *CPA Order 1*, have no criminal record unless the record was a political or false charge made by the Ba'ath party regime, have had no involvement in criminal activities, have demonstrated a high level of legal competence, and be prepared to sign an oath or solemn declaration of office. Section 5(3) permitted the appointment of reserve judges while 5(4) established the rating of the new CCCI judges in the official salary scales.

¹⁴⁵The CPA selected Zuhair al-Maliki as the CCCI-K's original chief investigative judge, despite his never having worked previously as a judge, being a Shi'ite under Saddam Hussein: Moss, *ibid*.

of law, whatever its nature, demands an element of certainty, but occupation law by its temporary nature is unable to provide it.

3.4.3 *The Problem of Legitimacy: Social Engineering by the Occupant*

Given broad powers to appoint and remove judicial officials for the duration of the occupation, the scope for the occupant to attempt social engineering in the composition of the judiciary, and therefore permanent change in its character, exists and must be managed against the purposes of occupation law. The limit must be a restrictive interpretation of the Hague Regulations and the requirement to restore the status quo ante in terms of *la vie publique*. In the Iraqi city of Najaf in September 2003, for example, the military governor from the US Marines ‘de-Ba’athified’ the local judiciary, and in the reappointment process sought to place a female judge on the bench. He was forced to back down on the day of the appointment by the “turbulent protest, supported by many local women, who felt that the Americans were imposing their social values upon the Iraqis.”¹⁴⁶ The case is reminiscent of Ganzglass’ observations that Somalis in the 1990s markedly preferred to draw judges and police from their own clans. Thus, the “reappearance of tribalism had the unforeseen advantage of establishing a sense of trust between the population in one particular area and the people who would later serve as judges and police, because they were all of the same clan or subclan.”¹⁴⁷

A survey of obstacles to reconstructing an effective Iraqi judiciary identified the “anger” of Sunnis with the loss of their historic dominance over the institutions of government as one of the most significant.¹⁴⁸ However, Roberts rejects a simple approach of equal representation on the bench, in view of both the Shi’ite “ignorance of legal practice” and the rejection of the new system by Sunnis as “religiously biased, retaliatory, and possibly a tool of the imperialist United States.”¹⁴⁹ Additionally, the demand for self-determination and cultural input pressures reform

¹⁴⁶CLAMO, *Rule of Law Handbook*, above n23, p165, citing CLAMO, *Forged in the Fire: Legal Lessons Learned during Military Operations 1994-2006* (2006).

¹⁴⁷Martin P. Ganzglass, ‘Afterword: Rebuilding the Rule of Law in the Horn of Africa,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p340), p342. Ganzglass noted a similar phenomenon in the early days of the Kosovo intervention.

¹⁴⁸Roberts, above n81, at 388.

¹⁴⁹*Ibid.*

under intervention.¹⁵⁰ Rather than equal representation as a value per se, Roberts recommends an effective and “legitimate” judiciary, which is representative in the form decided by the Iraqi people.¹⁵¹

For a popular conception of the rule of law that values what it claims are universal human rights, expressed in domestic judicial institutions, there is a strong motivation to attempt to produce a bench which reflects the gender, ethnic and demographic spread of the population. However, efforts in Iraq tend to suggest that the legitimacy of judicial appointments, and it would follow respect for the courts, reflects the indigenous view of representation. The appropriate test against the Hague Regulations and Geneva IV must be, as identified by the Israeli High Court of Justice in another context, whether the proposed action “would have a far-reaching and prolonged impact ... far beyond the period when the military administration will be terminated.”¹⁵² If so, the proper authority to implement such change is not the occupant. This aligns with the express limitation of the “necessity” of the administration of justice to intervene in the existing judicial structure. Although Geneva IV prohibits discrimination, this could be achieved by removing the possibility of discrimination from the appointments process, rather than implementing affirmative action where not matched by local demand.

3.5 Authority to Intervene in the Procedures of the “Administration of Justice”

The third means by which an occupant might intervene in the domestic judicial system is through procedural laws and practice, changes which could fundamentally alter the nature of complaints which might be brought to the court and the manner in which they are resolved.

¹⁵⁰Stromseth et al, above n8, p19.

¹⁵¹Roberts, above n81, at 367-8.

¹⁵²*Jerusalem District Electricity Co v Minister for Energy and Commander of Judea and Samaria Region* (1981) 11 *Isr YBHR* 354 at 357.

3.5.1 Creation of New Substantive Offences, and Amendment to Old

Subject to the creation of offences relating to the security of the occupant, the substantive penal laws in the occupied area “shall” continue in force, unless contrary to certain rights, such as non-discrimination, embodied in Geneva IV.¹⁵³ The *travaux* for Geneva IV indicate that ‘security’ was discussed in terms of cancelling “provisions such as those concerning recruiting or urging the population to resist the enemy.”¹⁵⁴ To what extent do the necessities of the “administration of justice” and orderly government allow further intervention in the content of penal laws?¹⁵⁵ Chapter Two established the broad purposive limitations imposed on legislative activity in this area, so that the occupant may not transplant its own law or legal system. This must be so even where the motive is altruistic, for example, the Israeli attempt to ensure “symmetry” with Israeli law and therefore avoiding “hardship for the local population” such as no fault compensation to accident victims.¹⁵⁶ Additionally, measures altering the status quo ante but authorised under Geneva IV as imperative to maintain order are expected in state practice to be temporary pending the resolution of sovereignty and the expression of the domestic will.¹⁵⁷

Security offences implemented in occupation tend to be unsurprising in content: in Iraq, for example, prohibiting prosecutions for collaboration-type activities,¹⁵⁸ increasing the penalty to life for offences concerning damage to public utilities and oil and theft of a means of transport,¹⁵⁹ and authorising the carriage of arms for a variety of civilian diplomats, security contractors and officials not

¹⁵³Article 64, Geneva IV.

¹⁵⁴Pictet, above n12, p335.

¹⁵⁵For example, the original Ottoman Criminal Code in the Iraqi area, based primarily on the French system, was updated by the British following their occupation of Basra in 1915, using colonial laws in India as a template: Medhat al-Mahmoud, above n43, p9.

¹⁵⁶Other changes included compulsory installation and wearing of seatbelts in motor vehicles and workers’ compensation rights: Israeli National Section of the International Commission of Jurists, above n9, pp8-9.

¹⁵⁷When Palestinian advocates went on strike, the Ramallah Court of Appeal held that an Israeli military order allowing Israeli lawyers to appear was imperative for the administration of justice and therefore permitted. However, the court did not indicate that it was permitted as a *permanent* change: *Muhammad Amin al-Ja’bary v Ahman Ya’qub ‘Abd al-Karim al-Awiwi* (1968) 42 Intl L Rep 484 (Court of Appeal, Ramallah, 17 June 1968); also *Jabari v Karim* (1968) unpublished File 44/67, District Court of Hebron, in Gerson above n67, at 13. And see the “suspensions” of various offences under Iraq law by the CPA, for example in *CPA Memorandum 5 – Implementation of Weapons Control Order Number 3*, entered into force 23 May 2003 (“*CPA Memorandum 5*”).

¹⁵⁸Section 3, *CPA Order 7 – Penal Code*, entered into force 10 June 2003 (“*CPA Order 7*”).

¹⁵⁹Sections 4-5, *CPA Order 7*.

otherwise permitted to do so under Iraqi law.¹⁶⁰ There is no requirement for public approval or positive acceptance of such measures.¹⁶¹ It should also be possible to introduce other administrative measures but only in so far as they addressed security matters. For example, an Israeli order permitting certain occupying officials the right to close criminal proceedings if convinced there is no public interest in pursuing them would be legitimate only for security offences, but not necessarily for all investigations under domestic law.¹⁶² The latter would have to be decided on a case-by-case basis and discontinued only where their security imperative was clear.

The position is equally clear for changes implementing prohibitions in Geneva IV itself, including the imposition of the death penalty by an occupant and the prohibition of torture,¹⁶³ or suspending aspects of the penal law consequentially affected by occupation, including the deposition of a former regime.¹⁶⁴ That said, CPA practice of suspending capital punishment is more consonant with international law than the Israeli abolition of it in their occupied areas.¹⁶⁵ There is not yet a clear rule of international human rights law which proscribes the death penalty.¹⁶⁶ Against

¹⁶⁰*CPA Memorandum 5* referred in its recitals to the CPA's obligation "to take all measures in its power to restore and ensure, insofar as possible, public order and safety in Iraq" but without any special obligation to protect diplomatic premises. Additional amendments to the *Weapons Code 1992* "suspended" extant exemption for government and social employees to carry weapons, and "amended" regulations on the amount of ammunition permitted to be carried by individuals licensed for weapons carriage: *CPA Order 3 (Revised) (Amended) – Weapons Control*, entered into force 31 December 2003, section 2(1) suspending Article 6.2 of the *Weapons Code 1992* and 2(2) amending Article 8.2 of the same statute.

¹⁶¹Compare the case of Kamal Mutib Salim, sentenced by the CCCI-K to 18 months imprisonment in 2004, for having bomb-making materials in his home. His defence counsel argued that no Iraqi law prohibited the possession of the materials that the soldiers claimed to have found in Salim's house and there was therefore no case before an Iraqi court: Spinner, above n16.

¹⁶²Compare the Israeli *Order for Closing of Files 841/1980*, which purported to apply to security offences and offences under Jordanian law: Shehadeh and Kuttab, above n40, p40.

¹⁶³Section 3, *CPA Order 7*.

¹⁶⁴Including suspending political offences affecting the Ba'ath party and its regime and insulting the president, and inserting a requirement for the Administrator's written permission to prosecute publication offences, offences against the external or internal security of the state or against public authorities and offences of insulting public officials: section 2, *CPA Order 7*, amending the *Penal Code 1969*, 3rd Edition.

¹⁶⁵Compare section 3, *CPA Order 7* and *Order Concerning Local Courts (Death Penalty) 268/1968*. The CPA suspension was upheld by the Iraqi High Tribunal (IHT) on the basis that it was temporary: *Dujail Case*, pp1-2.

¹⁶⁶The closest general instrument, the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989*, concluded 15 December 1989, New York, 1642 UNTS 414, entered into force on 11 July 1991, but, as at 13 October 2009, it had only 72 states party, much less than half of the international community: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en, viewed 13 October 2009. This is notwithstanding the instrument's adoption by the UN General Assembly in Resolution 44/128 (1989). The *Second Optional Protocol* elaborates Article 6 of the ICCPR, which was said to suggest abolition was "desirable" (prefatory remarks). On the status of the

this background, permanent abolition is most likely a non-mandatory, long-term interference in the social fabric which goes beyond the limits of Article 43, Hague Regulations and may not necessarily reflect the view of the population. In Iraq, for example, on conclusion of the occupation, the death penalty was immediately re-implemented.¹⁶⁷

More problematic is the case where the occupant attempts to implement 'rule of law' changes to judicial procedures and substantive offences. Although such intervention was overt in Iraq, it is also discernible in earlier occupations. For example, both the Allies in Germany and the CPA directed judicial officials to administer municipal criminal laws "impartially" and without discrimination, elements of blueprint rule of law judicial institutions.¹⁶⁸ The CPA also attempted to legislate for the inclusion of innovative human rights discourse into the criminal justice system, especially rights to defence counsel and gender equality, for example increasing penalties for kidnapping, rape and indecent assault and suspending mitigating circumstances in such cases.

3.5.2 Introduction of Non-Security Related Rights Discourse

There is a body of academic discussion on the principle of whether human rights law can apply in situations of occupation.¹⁶⁹ The *International Covenant on Civil and Political Rights* ("ICCPR") has been held to apply in time of war¹⁷⁰ and to acts done by a State in its extra-territorial jurisdiction.¹⁷¹ In any case, at the overarching level, international human rights law provides general principles, which are to be applied subject to the *lex specialis* of international humanitarian law,

death penalty in international law generally, see William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd Edition, Cambridge University Press, Cambridge, 2003.

¹⁶⁷ *Order for Reintroduction of the Death Penalty 3/2004* (8 August 2004).

¹⁶⁸ Section 4, *CPA Order 7*; prefatory remarks, *Control Council Law 4*.

¹⁶⁹ Kelly summarises a body of literature on the applicability of human rights law to situations of occupations, from those who reject its application absolutely, those who argue that at least some provisions were within the contemplation of the drafters of the Fourth Convention to the view of those who conclude that the law is not clear but sees no real utility in the debate: Kelly, above n9, paras 602-618 and the references he cites. However, the European Commission of Human Rights held that human rights law was to be applied in the Turkish occupation of northern Cyprus: *Loizidou v Turkey* (1996) ECtHR 15318/89.

¹⁷⁰ *Legality of the Threat or Use of Nuclear Weapons* (1996) 1 ICJ Rep 239 (Advisory Opinion of 8 July), para 24.

¹⁷¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep (Advisory Opinion of 9 July), para 111.

including occupation law,¹⁷² unless they reflect rules of *ius cogens*, in which case they apply to all situations and all countries as of law.¹⁷³

The difficulty is in determining *which* human rights law to apply to a legal system under occupation: is it the human rights law of the occupant extra-territorially (which is prohibited under the general law of occupation although the domestic obligations of occupants may require it), the law of the occupied territory (which may not incorporate it if that is the very purpose of the intervention), or the international rules applying by custom to all states, about which there is a divergence of interpretation.¹⁷⁴ Further, the derogability of human rights, particularly of the right to a fair trial,¹⁷⁵ albeit subject to the requirement in common article 3(1)(d), Geneva IV that the occupant observe the “indispensable judicial guarantees” common to civilised nations, is indicative of a lesser human rights requirement on an occupant fully obliged under international law simply because the facts of occupation, which require the occupant to *restore* public order, are capable of construction as a state of emergency.

Israeli authority concerning the freedom of the press took the first view above, arguing that occupation law was permissive and allowed the application of the right as it existed in Israeli administrative law – explicitly upheld as a substantive rights-based approach to the rule of law, as opposed to strict formalism.¹⁷⁶ Additionally, the US Supreme Court has held that where an occupation is “on behalf of” rather than “against” the occupied, the US authorities remain bound by the US

¹⁷²In any case, Adam Roberts considers that occupation law is broader and more particular to the situation faced than the more general human rights instruments: Adam Roberts, ‘The Applicability of Human Rights Law During Military Occupations’ (1987) 13 *Rev of Intl Studies* 39.

¹⁷³Article 53, *Vienna Convention*, above n48.

¹⁷⁴Plunkett argues that the legal authority for enforcing rule of law has three sources: “international law, the domestic law of the peacekeeper’s country and the host country, and consent through negotiated agreement from the host country’s feuding factions and the peace operation members:” Mark Plunkett, ‘Rebuilding the Rule of Law,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p207), pp214-5. However, host State consent is not at issue in occupation because authority is conferred internationally through Geneva IV and the Hague Regulations. On differing interpretations, see section 1.2.2 above.

¹⁷⁵The right to a fair trial in Article 14, ICCPR, is not included as a non-derogable right (Article 4); see further section 1.3.1 above.

¹⁷⁶*al-Taliah Weekly Magazine v Minister for Defence* (1979) HCJ 619/78, summarised in English in (1980) 10 *Isr YBHR* 333, and see Israeli National Section of the International Commission of Jurists, above n9, p38.

Constitution to offer civilian defendants the same constitutional rights as US citizens if they are charged with non-military offences before a court under US authority.¹⁷⁷

However, Article 64 provides that unless the penal laws of the occupied territory violate protections in Geneva IV, they are to continue in force. Human rights treaties that elaborate standards such as ‘discrimination’ in Geneva IV may prove useful in meeting this obligation.¹⁷⁸ Where standards differ, there are two possible outcomes. Where Geneva IV provides a broader compulsory regime than rights law, the broader regime is to be implemented by the occupant; Article 3 due process of law, for example, has not been recognised as a customary right.¹⁷⁹ Where Geneva IV standards are met, and there is no problem of security, but domestic rights standards are nonetheless “contrary to fundamental humanitarian standards,” it has been suggested that the occupant’s obligation to allow their continuation is alleviated in favour of a “general principle of international law that these fundamental standards of civilisation must be adhered to.”¹⁸⁰ The Allies relied on this in completely suspending the German judicial system in 1945.¹⁸¹

Where derogable rights do pose security problems, it would appear that the occupant has the competence to derogate from them: in its early stages, for example, the CPA did not re-introduce directly a freedom of assembly for security reasons, but expressed its “intention” to remove the prohibition in the extant *Penal Code 1969* “and advance towards normalisation ... as public security improves.”¹⁸²

3.5.3 Case Study: *The Right to Defence Counsel*

The right to adequate opportunity for defence before a properly constituted criminal court¹⁸³ is an apposite example of the relationship between rights law and

¹⁷⁷*US v Tiede and Ruske* (1979) Criminal Cases No 78-001 and 78-001A, US Department of Justice Reproduction.

¹⁷⁸Adam Roberts, ‘Applicability of Human Rights Law,’ above n172, at 73.

¹⁷⁹Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *AJIL* 348, at 357, citing the *Restatement of Foreign Relations Law of the United States (Revised)*, paragraph 702 (Tent. Draft No 6, vol 1, 1985).

¹⁸⁰*Haetzini v Minister of Defence* Israeli Supreme Court HC 61/80; Kelly, above n9, para 510.

¹⁸¹Mere suspension of laws facilitating the Holocaust, for example, would have meant the revival of those laws after occupation without further action: *Justice Trial*, Opinion and Judgment, p962, citing an article by George A. Zinn, Minister of Justice of Hessen, entitled “Germany as the Problem of the Law of States.”

¹⁸²Section 1(1), *CPA Order 19 – Freedom of Assembly*, entered into force 10 July 2003.

¹⁸³Article 9(3), ICCPR, requires the conduct of criminal trials “promptly before a judge or other officer authorised by law to exercise judicial power;” Article 14(3b) requires, in the “determination of

occupation. An occupant may be in a position where local defence counsel refuse to act under occupation, of particular significance to the occupant's scope to create security offences and tribunals, or the occupant may determine that the right to counsel currently provided in the domestic penal law is inadequate by their own or international standards. The existence of an independent legal profession capable of filling this role of challenging the exercise of state power against the individual is seen as one of the institutional underpinnings of the blueprint analysis of the rule of law.¹⁸⁴

In the first case, the Israeli response to a near universal strike by the Palestinian Bar Association has been to amend local law to grant Israeli lawyers a right of appearance and to invest the legal powers of the Bar Association in the Officer in Charge of the Judiciary.¹⁸⁵ The strike was based on a Palestinian complaint that the abolition of the Jerusalem courts on purported annexation were unlawful and so to "appear before the newly organised courts would give legitimacy" to them.¹⁸⁶ Jordanian law already provided for a range of criminal cases where legal representation was mandatory.¹⁸⁷ Provided this measure was expressed to be temporary, it would be within the competence to assure the 'administration of justice' in Article 64, because the administration of justice is ineffective without it.

In Iraq, however, the latter was the case. Thus the CPA legislated a right to counsel, including provision of legal aid for indigent defendants for "misdemeanours and felonies."¹⁸⁸ A right to counsel of choice before the CCCI-K was promulgated, including legal aid by a "suitably qualified attorney."¹⁸⁹ In practice, however, Iraqis

any criminal charge," the defendant to "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing" and (d) the ability at trial to "defend himself in person, or through legal assistance of his own choosing," with limited requirements for legal aid for indigent defendants.

¹⁸⁴Shehadeh and Kuttab, above n40, p45.

¹⁸⁵*Order Concerning Appearance in Court by Israeli Lawyers (Emergency) 145/1967*, originally for a six month period only, extended on expiry until such time as the Regional Commander is satisfied it is no longer required. Its avowed purpose was to "guarantee the rule of law and to ensure the continued functioning of the courts existing in the area:" see further Israeli National Section of the International Commission of Jurists, above n9, p33.

¹⁸⁶Shehadeh and Kuttab, above n40, p45.

¹⁸⁷Ibid, pp46-7 and the references there cited.

¹⁸⁸But not "infractions," the lowest level of criminal offending: sections 1 and 2 respectively, *CPA Order 53 – Public Defender Fees*, entered into force 18 January 2004.

¹⁸⁹Section 22, *CPA Order 13*. This step was critical for an effective right, as required by the ICCPR, since the private cost for a defence lawyer was high under occupation, calculated in thousands of US dollars or in kind for modern or exclusive goods: Gettleman, above n115.

reported the new right as ineffective in achieving its intended rule of law purpose. In the first case, on-going security concerns caused delays in judicial process and a lack of access to clients for the appointed counsel, notwithstanding Coalition efforts to create legal aid centres in their detention camps.¹⁹⁰ Secondly, the changes when unexplained caused difficulty – anecdotal reports suggested that the failure to specify that the right could be waived by the defendant meant it was being enforced *against* defendants who wished to plead guilty, “because the Coalition required every accused to have a lawyer whether he wanted one or not.” In this situation, the judge’s reasoning was based on the inquisitorial system’s assumption of the completeness of the code.¹⁹¹

The effort to meet an international standard, above that required for the purposes of the population, causes significant difficulties. This is particularly so for an occupant with a common law tradition, administering a society steeped in the civil law. Further, American criticism of the lack of volubility and strong defence by defence lawyers in CCCI-K proceedings¹⁹² was based on a lack of understanding of the operation of Iraqi procedure. In criminal matters, for example, while “lawyers can raise objections ... they traditionally play a smaller role than those in an American-style trial.”¹⁹³ This is attributable not just to a lack of familiarity but the long-held view that the common law constitutionalism is the better means to preserve individual rights,¹⁹⁴ although occupation law prevents that kind of importation of principle.

In this context, the prohibition on the introduction of the occupant’s law or legal system preserves the rule of law properly so called. The introduction of rights discourse which does not have an indigenous origin can significantly hinder rule of law outcomes as sought by the occupant, through lack of mutual comprehension from both parties as to their respective legal traditions and through the absence of a common, much less universal, understanding of the content of rights. Where there is no security purpose to be achieved, and no temporary intervention necessary to

¹⁹⁰Moss, above n21. One Iraqi defence lawyer considered that the delays and lack of access to clients under the CCCI-K set-up were no different to the Ba’athist legal system: Giordono, above n21.

¹⁹¹Interview with Captain Dunn, as reported in CLAMO, *Rule of Law Handbook*, above n23, p181.

¹⁹²For example, Frank, above n27, Part III.

¹⁹³Gettleman, above n15.

¹⁹⁴Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 9th Edn, MacMillan, London, 1948 (originally published 1885).

prevent activities contrary to Geneva IV protections, there should not be non-consensual rights-based intervention by occupants.

3.6 The Effect of Occupation Law on Efforts to Create the Rule of Law Through Judicial Reconstruction

The transition from occupation to sovereign government provides an opportune moment to test the permanent effect of judicial reconstruction attempted by the occupant. Since measures are intended to be temporary, and wholesale rejection by the sovereign is precluded (since no changes substantially affecting the character of *la vie publique* should have been implemented), the transition would logically be fairly smooth as concerns legal arrangements. It may be assisted, or occupation measures legitimated, by the involvement of an indigenous consultative organisation, such as the Iraqi Governing Council from the commencement of the occupation,¹⁹⁵ but this is not mandated. However, even in Iraq an extensive rescission and passing of transitional provisions proved necessary before the transfer of power on 28 June 2004 to the Iraqi Interim Government.¹⁹⁶

In the same way that international humanitarian law seeks to prevent the waging of total war by limiting the harmful effects of combat on civilians,¹⁹⁷ the law of occupation seeks to minimise the impact on the sovereignty and self-ordering of

¹⁹⁵The CPA established it as an interim Iraqi administration on 13 July 2003 and undertook to “consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council,” although the CPA did not surrender the temporary powers of government it had asserted in its Regulation 1 three months earlier. See *CPA Regulation 6 – Governing Council of Iraq*, entered into force 13 July 2003.

¹⁹⁶For example *CPA Regulation 9 – Dissolution of the Governing Council*, entered into force 9 June 2004. After the passage of the *Law of Administration for the State of Iraq for the Transitional Period* (“*TAL*”), the CPA found it necessary to rescind all orders, regulations, memorandums and other documents relating to the Governing Council of Iraq. Ahead of the transfer, all legislative acts of the CPA were asserted to remain in effect unless specifically rescinded or amended: prefatory remarks, *CPA Order 100 – Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, entered into force 28 June 2004 (“*CPA Order 100*”). Section 1 specifically addressed transfer of powers granted to the CPA Administrator, including amending the appointment procedure and excusing of judges for the CCCI-K, abolishing the Judicial Review Committee, and appointing the High Judicial Council to replace the Council of Judges: sections 3(6) and 6(13). The last was pursuant to Article 45, *TAL*. Unsurprisingly, part of the transition was also ensuring the continuity of the powers given to the Coalition when it became the Multi-National Force-Iraq (MNF-I): sections 2(7-8), 3(3), 6(5) and 6(8).

¹⁹⁷See for example Denise Plattner, ‘Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law’ (1998) 288 *International Review of the Red Cross* 249, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMAR>, viewed 13 October 2009.

an occupied territory by limiting the power of the occupant to effect permanent change to its social or political organisation. Further, aside from the fundamental problem of security, which imposes practical limitations on the rule of law power of the occupant, the very character of the occupant precludes their participation in the development of a rule of law system.

That is, military occupation itself is the most significant limitation on the rule of law,¹⁹⁸ even where it occurs pursuant to an agreement, especially a treaty of peace, given relative bargaining power.¹⁹⁹ Where the occupation lacks any cultural homogeneity or similarity with the occupied area, it will struggle to implement culturally appropriate reforms. Interestingly, the British activities in occupation of Basra, Mosul and Baghdad following World War One are identified as creating a legal and social climate in which Saddam Hussein was able to seize power.²⁰⁰ More recently, the CPA introduced the novel, federal CCCI-K to Iraq, which has lacked legitimacy for the populace because of its foreign origins and influences,²⁰¹ but was intended to reform the domestic rule of law.

Amplified by some earlier authority from the protracted Israeli occupation of various areas, the Coalition occupation of Iraq in 2003-4 demonstrates a declared interest in using the occupation powers to create or recreate the 'rule of law,' sometimes as a measure of security but more often, it seems, as a good in itself. This marks a departure from earlier practice in Germany and Japan, where the purpose was rather the explicit inculcation of democratic values. The law and democratic

¹⁹⁸CLAMO, *Rule of Law Handbook*, above n23, p162; Shehadeh and Kuttab, above n40, p11; Ernst Fraenkel, *Military Occupation and the Rule of Law*, Oxford University Press, Oxford, 1944, pp226-7, who says that failure to recognise the supremacy of citizens' consent was the "greatest weakness of the Rhineland Agreement," under which parts of Germany were occupied following World War One.

¹⁹⁹For example, Articles 3(c-e) and 4 concerning the continuation of German law, penal provisions and arrest, of the Rhineland Agreement (*Gazette*, 1920, No 1) which provided for the occupation of areas of Germany for 15 years. However, Marshal Foch declared for the Allied and Associated Powers that the Hague Convention would be applied, presumably in the interstices. See further Fraenkel, *ibid*, who at p225 describes the Agreement as "an idealistic model plan for an occupation."

²⁰⁰Roberts, 'Socio-Religious Obstacles,' above n80, at 401.

²⁰¹Other alternatives were in fact available. Roberts favoured the adoption of the Kuwaiti judicial model, which permits religious-based personal status adjudication but does so within a division of the civil court structure and would have retained but reformed the "dysfunctional" Ba'athist system: Roberts, *ibid*, at 392-3.

peace school would not distinguish the two in more than title, as they argue that democratic rights-based rule of law and peace go hand in hand.²⁰²

Rule of law was essentially a self-appointed mission so far as it went beyond the establishment of security and stability in Iraq.²⁰³ Security Council Resolution 1483 (22 May 2003) is ambivalent about any obligation of or authority in the CPA to create the rule of law, although along with all members states it is encouraged “to assist the people of Iraq in their efforts to reform their institutions.”²⁰⁴ Instead, the occupants are called on to administer Iraq effectively and work towards Iraqi self-determination, and the “*people of Iraq*” are called on to “to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens.”²⁰⁵ A UN Special Representative was appointed to work with the CPA and the Iraqi people in developing democratic institutions and legal reform.²⁰⁶ Neither the ‘rule of law’ nor the judiciary was specifically mentioned by the Security Council. Instead, a single paragraph highlights the need for effective domestic police and security forces to maintain law and order.²⁰⁷

The Coalition approach replaces earlier theories that non-interference in domestic law and policy were most conducive to the occupant’s security, and therefore also to peace generally.²⁰⁸ However, the fact of occupation and the privileges accorded to the occupant reveal a fundamental inconsistency in putative

²⁰²John Dugard, Special Rapporteur for the Commission on Human Rights, *Question of the Violation of Human Right in the Occupied Arab Territories, Including Palestine*, Commission on Human Rights E/CN.4/2004/6, 8 September 2003, para 3. Stahn, summarising, recognises that the authority of the occupant is not broad enough to permit “economic, social, and institutional change for the purpose of state-building: Carsten Stahn, ‘Justice under Transitional Administration: Contours and Critique of a Paradigm’ (2005) 27 *Hous J Intl Law* 311, at 339.

²⁰³Para 13, UNSC Resolution 1511 (2003). Planning for this reform in pursuit of democracy and a free market economy is evident in United States Institute of Peace, above n81.

²⁰⁴Para 1, UNSC Resolution 1483 (2003).

²⁰⁵Paras 4-5 and prefatory remarks, *ibid.* The Resolution was primarily concerned with the administration of donor funds, Iraqi national debt and the winding up of the oil-for-food program. UNSC Resolution 1511 (2003) clarified that the occupation would cease to be lawful when “an internationally recognised, representative government established by the people of Iraq” was sworn in: paragraph 1. In a letter to the Council prior to passing the Resolution, the Coalition declared itself to be “facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law:” Letter from Jeremy Greenstock, Permanent Representative of the United Kingdom, and John Negroponte, Permanent Representative of the United States, to the President of the United Nations Security Council, 8 Mar 2003.

²⁰⁶Para 8(c and i), *ibid.*

²⁰⁷Para 16, UNSC Resolution 1511 (2003).

²⁰⁸See Fraenkel’s critique of laissez-faire negotiation of the Rhineland Agreement, following World War One: above n198, p225.

'rule of law' measures under occupation. Whether judicial intervention is capable of bettering security is also arguable.

3.6.1 *The Occupant as a Non-Participant in the Legal System*

In the first case, and crucially, the occupant cannot create a rule of law relationship because it is not a subject of domestic law.²⁰⁹ The authorities agree that international law not only does not allow, but in fact prevents, the use of the domestic court structure against the occupant without consent.²¹⁰ Nor are occupation regulations subject to review, unless patently beyond the scope of Geneva IV and the Hague Regulations.²¹¹ An authority which is not part of the rule of law relationship properly understood is in no position to participate in its development, nor is executive fiat (the closest analogy to occupation rule) a non-instrumental rule governing the rule of law relationship. Thus, the Palestinian criticism of Israeli exemptions for their personnel and agencies from the jurisdiction of West Bank courts is correct when considering the rule of law in the area, but not because occupier assumes "the powers of a sovereign in all areas of government,"²¹² as claimed, simply because they are an occupant.

Nor is there a compulsion on the inhabitants of the occupied area to comply with acts of the occupant. Their resistance to foreign domination, even where intervention is limited to the occupant's security, is inevitable and is expressed in activities "inconsistent" with that security.²¹³ International law itself recognises this

²⁰⁹This is not to say that the occupant will never be subject to municipal law; it may negotiate a so-called Status of Forces Agreement which will govern the presence of its troops in the territory. Such an agreement was implemented in Iraq at the end of 31 December 2008, on expiry of UN Security Council authority for intervention. In this part, discussion refers to occupants present without consent of the territory where there is no international agreement governing their presence.

²¹⁰Von Glahn, above n9, p3; and see also Israeli National Section of the International Commission of Jurists, above n9, p13.

²¹¹*Muhammad Amin al-Ja'bari v Ahman Ya'qub 'Abd al-Karim al-Awiwi* (1968) 42 Intl L Rep 484 (Court of Appeal, Ramallah, 17 June 1968); *Halvorsen* (1942-3) 11 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 604.

²¹²Shehadeh and Kuttab, above n40, p36. The *Order Concerning Local Courts (Status of Israel Defence Force Authorities)* 1967 exempts Israeli military personnel and executive agencies from the jurisdiction of West Bank courts except by permission of the Area Commander: see especially section 2. Interestingly, it appears such permission was often granted, at least in the early years of the occupation: Israeli National Section of the International Commission of Jurists, above n9, p14.

²¹³Major Richard B. Baxter, 'The Duty of Obedience to the Belligerent Occupant' (1950) 27 *BYBIL* 235, at 235. Baxter criticises French and continental practice which seems to locate a duty to obey in the force exerted by the occupant as a concession to or approval of the conduct of hostilities implicit. His view is strongly supported by the prohibition on the use of force in international relations in

in 1977 Geneva Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, which applies to anti-colonial movements.²¹⁴ Baxter concludes that there is no moral or legal obligation on the inhabitant of an occupied territory to obey the occupant in international law.²¹⁵ However, Morgenstern disagrees, suggesting that “in justice and in legal logic” there must be an obligation to obey orders issued within the scope of occupation law.²¹⁶ Customary practice is firm that the Hague Regulations and Geneva IV do confer certain competences on the occupant, albeit not sovereignty, and this grant would be nugatory without a minimal obligation to comply on the part of the occupied. Nor would there be utility in protecting the status quo ante without such.

Even where a blueprint program is implemented to form the ‘rule of law,’ measurability of outcomes is problematic. The approach, using sweeping principles such as ‘due process,’ was implemented and criticised in the Rhineland after World War One²¹⁷ but is still employed. Measures such as the number of courts in operation does not shed light on the rule of law quality of those institutions, although the speed of their restoration might demonstrate achievement of Hague Regulations requirements to restore *la vie publique*.²¹⁸ Similarly, tracking the number of cases resolved does not account for the observed phenomenon of a rise in crime during periods of reform of security institutions,²¹⁹ while assessment of “interference” or

Article 2(4), *Charter of the United Nations*, 24 October 1945, San Francisco, 1 UNTS 41, entered into force 1 November 1945.

²¹⁴Article 1(4), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Geneva, 1125 UNTS 3, entered into force 7 December 1978.

²¹⁵Baxter, above n213, at 243, 260.

²¹⁶Morgenstern, above n4, at 295, citing in support *de RidderTartain v Procureur du Roi* (1920) 47 Clunet 727 (20 May 1916). He prefers to see the Hague Regulations as “a compromise” between the interests of the occupier and occupied.

²¹⁷Fraenkel, above n198, p230, considering the possible form of a (permanent) occupation of Germany on conclusion of the then-progressing Second World War. Stromseth et al favour “a constructive approach to building the rule of law must be *ends-based and strategic, adaptive and dynamic, and systemic*. We call this the *synergistic approach*.” above n8, p13. However their program is still based on a judiciary and court structure with measurable features.

²¹⁸For example, Coalition forces monitored the rate of operation of regional courts. By the end of June 2003, the courts in Babil, Karbala and Najaf provinces were operating: Major Craig Bennett, US Judge Advocate, al-Hillah Government Support Team (July 2003), as quoted in CLAMO, *Rule of Law Handbook*, above n23, p171. See also L. Paul Bremer, ‘Address to the Iraqi People on Justice,’ for broadcast 14 November 2003, http://www.coalitioniraq.org/transcripts/20031114_Nov-14-Bremer-Justice-post.htm, viewed 23 March 2008.

²¹⁹Seth Jones, Jeremy Wilson, Andrew Rathmell, and K. Jack Riley, *Establishing Law and Order After Conflict*, Rand Corporation, Santa Monica, 2005, p.xiv.

“external influence” especially “undue religious influence,”²²⁰ may confuse corruption with the crystallisation of an indigenous rule of law. At least some of these factors will necessarily form part of the domestic rule of law discussion (and self-determination), particularly tribal and religious influences,²²¹ yet these are identified as indicators of the absence of the rule of law. The occupant attempting to implement rule of law measures faces the awkward situation of being unable to participate in the very process it wishes to foster, and being unable to measure the rule of law impact of programs it does attempt.

3.6.2 Competence of the Occupant to Act Contrarily to Rule of Law Principle in the Pursuit of Order

The primary concern of the occupant with security, both in international law and of necessity, allows and encourages actions directly contrary to the rule of law, even as understood internationally as a rights-based democracy. Article 78, Geneva IV, conceives of administrative detention for “imperative reasons of security;” that is, detention not on the basis of conviction and sentence by a criminal court following regular criminal proceedings, nor on the basis of a judicial order of arrest.²²² This was the basis of the Coalition’s Combined Review and Release Board (CRRB) which decided, administratively and without representation of the individual, whether a person acquitted by the CCCI-K could be released or is to be further detained, this time without charge.²²³ Iraqis claim that this practice contributed to frustration with occupation and further violence.²²⁴ Israel too provides for extendable periods of administrative detention for “reasons of regional or public security;” it is subject to early judicial review but excludes certain elements expected of a fair trial, including allowing ‘confidential’ evidence not revealed to the

²²⁰Colonel Bruce Pagel, JA, USAR (First Infantry Division Rule of Law Officer May 2004-February 2005) in CLAMO, *Rule of Law Handbook*, above n23, p193 (FN 7), reporting the criteria employed by an Assessment Team in North Central Iraq during Operation Iraqi Freedom 2.

²²¹See for example the extensive debate about the role for Islamic Shariah law in the new Iraqi Constitution, and the CPA’s statements about the level of dependence on the Shariah it would permit in enacting the draft document: Kristen Stilt, ‘Islamic Law and the Making and Remaking of the Iraqi Legal System’ (2004) 36 *Geo Wash Intl LR* 695, at 707.

²²²Z. Hadar, ‘Administrative Detentions Employed by Israel’ (1980) 1 *Isr YBHR* 283. See the rights enumerated in Article 14, ICCPR, regarding trial and conviction, and in Principle 70, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

²²³Moss, above n21.

²²⁴Ibid.

defence.²²⁵ This is an exception to the general principle that arrest or detention which is not followed by criminal proceedings is a breach of international law²²⁶ and the legal safeguards customary among “civilised nations.”²²⁷

Administrative detention, in addition to the measures discussed above, is contrary to the traditional concepts of the rule of law. Granting the occupant the competence to disregard those theories, in addition to its absent competence to participate in the rule of law properly so called, is firm evidence of exclusion of a rule of law competence to occupants.

3.7 Conclusion: The Fundamental Problem of Security

In attempting to procure the rule of law through legislative intention in the domestic judicial structure, the CPA has encountered the same conundrum as has faced many occupants. Theorists argue that an essential element of the rule of law is strong and independent judicial institutions, and that the power of the occupant to maintain security and public order authorise such intervention, however judicial institutions are not able to function in this way in an insecure climate. In Somaliland in 1941, for example, the British considered that “the first necessity in Somalia was a strong and well organised police force, upon which the institution of courts and judicial machinery could wait.”²²⁸

International rule of law theory and practice, however, represent the judiciary as “a crucial co-requisite” to the constitution and democratic elections that dominated the CPA administration in 2003, while the maintenance of basic security was carried “simultaneously.”²²⁹ The problem for Iraq was the degree of public opposition, including violent opposition, to the occupation; the occupation was simply not

²²⁵Section 87A-D, *Order Concerning Security Provisions 378/1970*. See further Israeli National Section of the International Commission of Jurists, above n9, p72 et seq. A similar scheme applies to house arrest and restriction orders for reasons of security: p87.

²²⁶*Palios v Germany* summarised in (1933) III(2) *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 119, and see G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol II: The Law of Armed Conflict, Stevens and Sons, London, 1968, p221.

²²⁷“Le détenu doit être traité d’une manière appropriée à sa situation, et qui corresponde au niveau habituellement admis entre nations civilisées.” *Chevreau Arbitration* (1931) 2 RIAA at 1123.

²²⁸Lord Rennell of Rodd, *British Military Administration of Occupied Territories in Africa During the Years 1941-1947*, His Majesty’s Stationary Office, London, 1948, pp333-4.

²²⁹Roberts, ‘Socio-Religious Obstacles,’ above n80, at 368-9.

comparable with an occupation following surrender or peace treaty, such as in 1945.²³⁰ Indeed, judicial security was so low as to require the CPA to make provision for pensions for the families of judges and prosecutors assassinated after the commencement of occupation.²³¹ Judicial decision-making even at the flagship institution of the CCCI-K was reportedly subject to pressure from government and from militant groups,²³² while the limitations on communication due to the military situation in southern Iraq in 2003 meant CPA changes to the *Penal Code* could not be evenly implemented.²³³

In this climate, which is the cart and which the horse? Jones et al argue that, to achieve “success” in rebuilding internal security post-conflict, three things are necessary: the “golden hour,” the first window of opportunity following intervention of “several weeks of several months” must be taken advantage of, police and security reforms must be associated with a functioning judiciary and minimum resource levels and means identified in recent interventions must be applied.²³⁴ Occupation law, however, presents a different perspective. It mandates temporary administrative intervention in the justice system, only to keep it functioning, but it grants very extensive powers to the occupant to restore order and to maintain its security through Article 43 of the Hague Regulations and through Geneva IV. Some of these measures, in particular the establishment of extraordinary military occupation courts and creation of security offences outside the domestic system of criminal justice, are contrary to substantive and formal rule of law theories, and well outside the ‘blueprint analysis.’

Where occupation law expresses no interest in the ‘rule of law’ popularly so called, in fact favouring the formation of a domestic rule of relationship, and provides broad security powers inconsistent with the first theory of the rule of law, it is clear that security must precede a preoccupation with the rule of law and that achieving security requires derogation, within the scope of human rights law, to create an environment in which post-occupation rule of law might flourish. It is

²³⁰Jones et al, above n219, p.vii.

²³¹*CPA Order 52 - Payment of Pensions for Judges and Prosecutors who Die while Holding Office*, entered into force 8 January 2004, providing for pensions at 80% of salary for judges and prosecutors who died or were killed in office after 1 June 2003.

²³²Moss, above n21.

²³³Interview with Captain Dunn, as reported in CLAMO, *Rule of Law Handbook*, above n23, p177.

²³⁴Jones et al, above n219, pp.xi-xii.

neither proper nor effective for an occupant to attempt to intervene in the domestic judicial system in an attempt to create, recreate or enforce any understanding of the 'rule of law,' nor have they that capacity. The appeal to such rhetoric may attract international legitimacy to a domestic undertaking which will feed the systemic coherence of international law, but it cannot and will not result in the domestic rule of law.

CHAPTER FOUR:

SECURITY COUNCIL INTERVENTIONS OUTSIDE AN EXPLICIT OCCUPATION FRAMEWORK

The United Nations Security Council, using its coercive powers to restore and maintain “international peace and security” under Chapter VII of the *Charter of the United Nations*, has authorised a range of interventions in recent years which challenge notions of rule of law or judicial reconstruction by military forces,¹ similarly to the challenges posed by occupation law. These include interventions by UN forces with the consent of a government in the host state, interventions where UN forces comprise a “transitional authority” exercising all or some of the powers of government, and interventions where the UN expresses support but allows interventions to occur under national command.² It matches the American rhetorical and strategic focus on the rule of law as one of the “nonnegotiable demands of human dignity” along with a range of individual rights.”³

The Security Council has not authorised an intervention where the Resolution itself acknowledges the application of occupation law – therefore the questions arise: what law does apply to such interventions, and how does that body of law authorise or accept intervention in domestic judicial systems to achieve the rule of law, in a legal environment which demands self-determination and favours national

¹*Charter of the United Nations*, 24 October 1945, San Francisco, 1 UNTS 41, entered into force 1 November 1945; Michael A. Newton, ‘Harmony or Hegemony: The American Military Role in the Pursuit of Justice’ (2004) 19 *Conn J Intl Law* 231, at 232.

²Examples include intervention in Iraq based on host state consent (UNSC Resolution 1546 (2004), extended annually in Resolutions 1637 (2005), 1723 (2006) and 1790 (2007); United Nations Transitional Authority in East Timor (UNTAET; UNSC Resolution 1272 (1999)), United Nations Transitional Authority in Cambodia (UNTAC; UNSC Resolution 745 (1992)) and United Nations Mission in Kosovo (UNMIK; UNSC Resolution 1244 (1999)) as transitional authorities; and national command-based intervention in the Unified Task Force (UNITAF), working with United Nations Operation in Somalia I (UNOSOM I), authorised in UNSC Resolution 794 (1992), or the United Nations Assistance Mission in Rwanda (UNAMIR), which forces under national command agreed to ‘co-operate’ with the UN Secretary General to achieve the designated mission (UNSC Resolutions 872 (1992) and 929 (1994)).

³Including “free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property: *The National Security Strategy of the United States of America*, (September 2002), p9, available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>, viewed 5 April 2009; see also Newton, *ibid*, at 233.

jurisdiction in criminal prosecutions?⁴ Further, how does the use of military interveners aid or hinder such programs? In Iraq since the end of occupation in 2004, military interveners have taken an active role, contrary to the reality that the success of intervention is in establishing the secure environment required for the rule of law whose realisation will follow, rather than in direct judicial intervention.⁵ An analysis of the course of intervention in Iraq, and other states, follows a conceptual rather than chronological path in this chapter. This recognises that widespread public rejection of the intervention in Iraq by Coalition forces acting with UN authority, notwithstanding the consent of Iraqi authorities, provides a useful counterpoint to other interventions focussed on self-determination, particularly East Timor, in discussing legitimacy. It is legitimacy, in the sense of social acceptability, that will be seen as an essential element in rule of law formation, as opposed to the restoration of order and security.

Before considering the application of law to the intervention itself, recent developments in the doctrine of humanitarian intervention, or the ‘responsibility to protect,’ mean that egregious human rights abuses may themselves justify an intervention in circumstances where the international rule of law is rights-based, affecting the scope of action permitted during intervention. The possibility of military intervention where a state’s legal system does not meet the popular rights-based, institutionalist model of the rule of law which dominates internationally has significant consequences for the formation of a domestic rule of law relationship – and, while not yet crystallised as a justification for direct intervention, this possibility is not precluded by current trends. It represents the culmination of the tension identified in Chapter One, in which the international rule of law demands reasonable consistency in the domestic rules of law for its own coherence,⁶ because it potentially subjects the domestic rule of law relationship to armed force in the quest for international rule of law coherence. It appears that there is an openness to the idea of

⁴For example, the principle of complementary jurisdiction in the Preamble and Article 1, *Statute of the International Criminal Court*, concluded 17 July 1998, Rome, 2187 UNTS 3, entered into force 1 July 2002, UN Doc. A/CONF.183/9* (“*Rome Statute*”).

⁵Newton, above n1, at 238.

⁶See particularly section 1.7, Chapter One above.

such a right of intervention, based in two decisions identifying judicial activity contrary to rights-based rule of law practice as a crime against humanity.⁷

This has become important since the adoption of UNSC Resolution 1040 (1996), the first Council reference to the ‘rule of law’ in the context of supporting the Secretary-General’s intervening efforts to “facilitate a comprehensive political dialogue the objective of promoting national reconciliation, democracy, security and the rule of law” in Burundi,⁸ which has been said to mark a move towards using the Security Council’s coercive powers to supplant the legal system of the state where it is assessed as not meeting rule of law standards as recognised in international law.⁹

Concerns have been raised in rule of law interventions which lack explicit authority from the Security Council that the intervener “should subject their intervention to the adjudication by the International Court of Justice,” including at the instance of the state subject to intervention.¹⁰ In such manner can the intervener demonstrate their own subjection to the *international* rule of law.¹¹ The benefit of international judicial oversight, in Sampford’s view, is that the complaining state, to obtain redress, must also submit itself to examination as to its compliance with the international rule of law, including human rights, so that the “mechanism for subjecting interveners to the rule of law, desirable of itself, also deals with one of the strongest objections to it.”

⁷*US v Altstötter et al*, (1948) 3 TWC 1 (“Justice Trial”) and *Case Nr1/9 First/2005 al-Dujail Case*, Iraqi High Tribunal, 2006 (“Dujail Trial”), judgment translated unofficially from Arabic to English by Mizna Management LLC, available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>, viewed 6 October 2009.

⁸Para 2. UN interest in the rule of law is a relatively recent phenomenon, noting both its ‘conspicuous absence’ from the Charter, and the authority conferred on the Security Council in Chapter VII to respond to threats to “international peace and security,” but not explicitly breaches of international law, suggesting that the two “do not necessarily overlap.” Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge University Press, Cambridge, 2007, pp15-16. Farrall traces its emergence in UN discourse, noting an enormous increase in references to the rule of law in UNSC Resolutions from 1998 (references in 69 Resolutions in 1998-2006, compared to a “handful” during the Cold War): p22. The rule of law was included in “peace operation mandates” in the Central African Republic, Angola, the Democratic Republic of the Congo, Afghanistan, Haiti, Iraq, Guinea-Bissau, Sudan and Burundi: p22 and the references there cited.

⁹Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 *Am J Comp L* 331, at 348.

¹⁰Charles Sampford, ‘Reconceiving the Rule of Law for a Globalizing World’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p9), p25.

¹¹*Ibid*.

4.1 When is a State's Failure to Demonstrate a Rights-Based Rule of Law Itself Potentially Grounds for Intervention?

The concept of humanitarian protection, particularly to protect human rights whose content is not always universally agreed, has been rejected by a significant proportion of states who prefer to stand on a strict view of the Charter principles of non-interference in the domestic affairs of states.¹² Their fear is neo-colonialism under the 'cloak' of altruism.¹³ This emerges as a significant concern for the rule of law as a domestic relationship. Secondly, there is no necessary link between a 'humanitarian operation' and judicial reconstruction or rule of law activities, as the latter is not a precondition to security, as demonstrated under occupation. Of the range of protective activities carried out in Bosnia-Herzegovina, for example, none involved direct intervention in the judiciary – the closest was voluntary reporting to the Commission of Experts and International War Crimes Tribunal – probably because of the environment of an "all-out and merciless war."¹⁴

A putative authority to intervene where a domestic legal system fails to demonstrate the individual human rights compliance required by the international rule of law must take its core justification from two decisions in which domestic judges were convicted of crimes against humanity for participating in such legal systems. The first was the so-called *Justice Trial* of 1948,¹⁵ the second the conviction of Awad Hamad Badr al-Bandar as-Saadoun, former president of the Revolutionary

¹²In April 2000, 114 member states of the Non-Aligned Movement condemned humanitarian intervention: Thalif Deen, 'Politics: Non Aligned Movement Slams "Humanitarian Intervention,"' *Inter Press Service*, 6 April 2000.

¹³Michael Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*, Australia Government Publishing Service, Canberra, 1997, para 112 and the references there cited.

¹⁴Sergio Vieira de Mello, 'Humanitarian and Military Interface in Peace-keeping: Cambodia and Bosnia-Herzegovina: A Comparative Analysis' in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p18), p21, referring to the UN Protection Force (UNPROFOR) in Bosnia-Herzegovina and its expanded humanitarian mandate under UNSC Resolution 758 (1992).

¹⁵*Justice Trial*. The sixteen indicted German defendants included five judges, four prosecutors and eight officials from the Reich Ministry of Justice (Engert was both judge and official), charged with war crimes and crimes against humanity (1939-45), conspiracy to commit the foregoing (1933-45) and membership of certain organisations declared criminal by the International Military Tribunal. Control Council Law 10 set out these matters as crimes. The Tribunal convicted ten of the sixteen of one or more charges, sentencing them to terms of imprisonment including life imprisonment. Four were acquitted and the trials of Westphal and Engert were discontinued – Westphal had died and Engert was seriously ill. For a case in which the same approach was applied to special wartime military courts, see *Isayama*, US Military Commission (Shanghai), 25 July 1946, reported in Jean-Marie Henckaert and Louise Doswald-Beck (Eds), *Customary International Humanitarian Law*, Vol 2 (Practice Part 2), Cambridge University Press, Cambridge, 2005, p2385.

Court, by the Iraqi High Tribunal (IHT) in 2005. The former in particular was a trial less of the defendants than one in which “the judicial system of the Third Reich as a whole” was indicted;¹⁶ accordingly, evidence was presented as to the administration of justice generally, only then as to each defendant’s actions in its perpetration. In the latter, Awad Hamad was charged with crimes against humanity,¹⁷ and with murder contrary to section 406 of the Iraqi *Penal Code 1969*. The cases are significant because they identify international limitations on the character of the legal system able to be implemented internally by independent States, breach of which may justify direct intervention. In addition to establishing acts which constitute war crimes by individual judges, they determine a measure by which entire judicial systems are judged criminal based on egregious human rights abuses, noting that it is this key phrase which governs the concept of ‘humanitarian intervention.’ As with all other cases of ‘humanitarian intervention,’ the trend sits very tensely with the *UN Charter* and specifically its prohibition on the use of force.

4.1.1 *Rejection of Judicial Activity as an Act of State in International Criminal Law*

Acts committed by or assumed by a state are immune from individual criminal liability under foreign municipal law, because sovereignty is equal; that is,

¹⁶“Das Verfahren war das einzige der Nachkriegszeit, mit dem die Justiz des Dritten Reiches als Ganzes ‘bewältigt’ werden sollte.” Professor Dr Klaus Kastner, “*Der Dolch des Mörders war unter der Robe des Juristen verborgen:*” *Der Nürnberger Juristen-Prozess 1947*, http://www.justiz.bayern.de/imperia/md/content/stmj_internet/gerichte/oberlandesgerichte/nuernberg/kastner_jp.pdf, viewed 17 October 2009 (translated by the author), p4. In part this was due to the absence of those with the greatest responsibility: Roland Freisler, the ‘hanging judge’ of the extraordinary People’s Court (similar in structure and purpose to the Iraqi Revolutionary Court presided over by Awad Hamad) was killed in an air raid in 1945; and the president of the *Reichsgericht* and both Ministers of Justice were also dead (Minister Otto Thierack by suicide while in Allied custody): see further Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich*, Harvard University Press, Cambridge Massachusetts, 1991, (translated by Deborah Schneider), p270.

¹⁷As defined in Article 12, *Law of the Iraqi Higher Criminal Court 10/2005* (replacing the *Statute of the Iraqi Special Tribunal 1/2003*, issued by the Iraqi Governing Council pursuant to delegation in *Coalition Provisional Authority Order 48: Delegation of Authority Regarding an Iraqi Special Tribunal*, entered into force 10 December 2003). The definition follows those of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court: Michael Scharf and Michael Newton, ‘The Iraqi High Tribunal’s Dujail Trial Opinion’ (2006) 10(34) *ASIL Insights*, available at <http://www.asil.org/insights061218.cfm>, viewed 14 October 2009. The indictment itself specifically concerned murder, arrest of civilians, destruction of private property, devastation of the Dujail village area, torture and judicial murder in the village of Dujail following an alleged assassination attempt there on Saddam Hussein on 14 October 1984.

they are barred from prosecution, not necessarily not criminal.¹⁸ If judicial activity is considered an act of state, then jurisdiction to prosecute judges remains with the home state if the acts are criminal, notwithstanding the reality that states will not prosecute acts they have accepted as acts of state, and if the act is disclaimed, then immunity is waived. The *Justice Case*, dealing with international crimes, also recognised the primacy of domestic jurisdiction, permitting trial in another State only if it procured the defendant before the court, or a competent international tribunal.¹⁹ The IHT found that immunity from trial for crimes against humanity was “impossible,” dismissing the objection of counsel for Saddam, although because domestic crimes had also been charged, the question was largely academic.²⁰

The problem for the assertion of a right to intervene based on the criminality of the domestic judicial system is therefore the limitation of jurisdiction. In Germany, since occupying Allies brought the prosecution, the Tribunal asserted the Control Council’s legal right, in the absence of a functioning sovereign government, to give consent on Germany’s behalf.²¹ However, this was a far broader claim of right than under the general law of occupation, essentially asserting sovereignty. Through the implication of consent, it acknowledged the application of act of state doctrine to judicial activity, contrary to its later assertion that it “can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.”²²

The Nuremberg Tribunal took a slightly different view than the IHT: they considered that the laws and “perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity.”²³ If the laws and judicial system were the essence of Nazi criminality, then the German state must have borne

¹⁸See Robert Woetzel, *The Nuremberg Trials in International Law*, Revised Edition, Stevens, London, 1962, p67. For a broader explanation of the act of state doctrine, see Yitih Simbeye, *Immunity and International Criminal Law*, Ashgate Publishing, Aldershot, 2004, p124 et seq.

¹⁹*Justice Trial*, Opinion and Judgment, p967.

²⁰*Dujail Trial*, Opinion, Part 1, p32, 41, adopting the judgment of the International Military Tribunal (IMT) in *Trial of the Major War Criminals*, Nuremberg, 14 November 1945 - 1 October 1946.

²¹The Tribunal in the *Justice Case* concluded that as Germany was no longer a belligerent and was incapable of government, the Allied powers were seized of full legislative and constitutional power, rather than the interim power accorded to occupying belligerents under international law: Opinion and Judgment, pp960-4, 971.

²²*Ibid*, p984.

²³*Ibid*.

primary liability, law-making being the quintessential act of state.²⁴ Further, in the case of criminal laws, the offence is generally understood to have been committed against the state and the state administers punishment in the person of the judge.²⁵ Since law-making is not beyond the competence of the state per se, the Tribunal fixed upon the exercise of state power in accordance with National Socialist ideology as the criminalising element.²⁶ That is, the exercise of state power to particular ends may be beyond its competence and internationally criminal – not, after all, an act of state.²⁷

However, international criminal liability can attach only to individuals, who procure these purported acts.²⁸ Judge Schlegelberger bore “primary liability” for the Nazis’ Night and Fog Decree, which he had signed, and hence was liable as a principal for the abuses which flowed from it.²⁹ Subsequent German courts have tried to deal with this conundrum by ascribing primary blame to the “leaders of the National Socialist regime”³⁰ and convicting judges and Ministry officials as accessories to the crimes of these “indirect perpetrators.”³¹ In this way, the guilt of the state is maintained, but at least some individual liability is accepted.

²⁴The British prosecutor argued before the IMT that Germany was herself a criminal state, and the defendants accessories to her crimes: *Trial of Major War Criminals before the International Military Tribunal, Nuremberg* (1947) Volume 1, p223, and see Quincy Wright, ‘International law and Guilt by Association’ (1949) 43 *AJIL* 746, at 411. Evidence was led at the *Justice Trial* that Hitler’s progression to sole legislator was arguably in accordance with the Weimar Constitution, and therefore laws passed were, formally, lawful: Testimony of Defence Witness Professor Jahrreiss, pp253-68.

²⁵For example, the Australian Constitution speaks of the “judicial power of the Commonwealth” in section 71, which must necessarily be administered through individuals, while the *Criminal Code 1995* (Cth) codifies all “offences against laws of the Commonwealth” (section 1.1).

²⁶For example, laws dealing harshly with habitual criminals, looting, hoarding and limitations on free speech were not criticised but those referring to ‘the sound sentiment of the *Volk*’ were judged criminal: *Justice Trial*, Opinion and Judgment, p1026.

²⁷See Wright, above n24, at 410.

²⁸The IMT in the *Trial of the Major War Criminals* found that crimes “against international law are committed by men, not by abstract entities,” and the *Justice Case Tribunal* adopted the ruling verbatim at Opinion and Judgment, p1062. Accordingly, Article 2(2) of *Control Council Law No 10* (20 December 1945) provided for a range of liabilities, from ‘connection’ with the crime to ordering its commission.

²⁹*Justice Trial*, Opinion and Judgment, 1083. The precise status of each conviction is not always clear in the court’s judgment.

³⁰Augsburg *Landgericht*, 15 October 1955 (trial of judges Huppenkothen and Thorbeck for the execution of the July 20 resistance leaders), discussed in Müller, above n16, p250.

³¹Wiesbaden *Landgericht* (trial of “high-ranking” Ministry officials), discussed in Müller, above n16, p251 – no date supplied.

4.1.2 The Universality of 'Justice' in the Mens Rea of Judicial Crimes

As the cognitive element of crimes against humanity committed by judges, the Nuremberg Tribunal sought evidence that:

the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind and that he knew or should have known that he would be subject to punishment if caught.³²

Constructive knowledge based on appointment could satisfy the first element of knowledge of morally shocking and systemic injustice.³³ Further, knowledge need only have been of the fact, rather than knowledge of the acts' inhumanity.³⁴ The imposition of criminal liability on an objective standard of knowledge is open to substantial criticism, since the *Justice Case* Tribunal inferred it simply from the defendants' status as jurists; it found the argument as to the binding nature of German law on the defendants irrelevant, because the domestic laws themselves were contrary to international law.³⁵ The IHT took a similar view against Awad Hamad.³⁶

Rather than an impermissible defence of superior orders (which would be contrary to an independent rule of law judiciary anyway), the defence argument at Nuremberg more closely resembled mistake of law, characterised as a defence negating *mens rea*.³⁷ This construction is neutral as to the criminality of national

³²*Justice Trial*, Opinion and Judgment, pp977-8.

³³Klemm, for example, denied knowledge of Night and Fog procedure, but the Tribunal did not accept that a State Secretary whose "sources of knowledge were of a wide scope" lacked it: *ibid*, pp1090-93.

³⁴Klemm ought to have known of Night and Fog procedure, thus when the Tribunal judged it criminal, the criminality could be imputed to his factual knowledge. Further, the level of knowledge was set low; it sufficed that Klemm knew and "approved in substance, if not in detail" of the mass execution of prisoners at Sonnenburg: *ibid*, p 1106. This approach is now one of the International Criminal Court's *Elements of Crimes 2002*, ICC-ASP/1/3(part II-B) (agreed by the Assembly of States Party), Article 30.

³⁵Lautz, as "a lawyer of ability ... must have known that the proposed procedure was in violation of international law," but "if German law were a defense, which it is not, many of [Lautz's] acts would be excusable:" *ibid*, pp1076, 1128. See also the dismissal of defence submissions for Rothenberger, p1109, and Kastner's discussion, above n16. The real difficulty faced by tribunals of the *Justice* model is to adapt legal principles to morally repugnant situations, resolved in the *Justice Case* by overtly addressing the prosecution in terms of morality and the conscience of mankind: for example, pp977-8. See further Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Faber and Faber, London, 1963, pp251-2, where she discusses the emphasis on criminal trial above the quest for moral explanation.

³⁶Further, as a judge and law graduate, al-Bandar "enjoys certain skills that might not be available to simpler people:" *Dujail Trial*, Part 2, p30.

³⁷See Yoram Dinstein, 'Defences,' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (Eds), *Substantive and Procedural Aspects of International Criminal Law*, Vol 1, Kluwer, The Hague, 2000

laws, and has been subsequently applied to the investigation of judicial officials.³⁸ It answers the problem of defendants steeped in the impugned judicial and social system, who may not in fact recognise the criminality of the laws applied.³⁹ For example, Awad Hamad argued in defence that “he only did what any judge would have done in a court established under the law” and that he followed all legal procedures during the trial of the Dujail villagers.⁴⁰ He also argued that the circumstances of the Iran-Iraq War were relevant and should be taken into account as diminishing the judicial standard required.⁴¹ Finally, Awad Hamad argued that he was under duress as a “government employee and not a judge.” All arguments were rejected.⁴²

The result is a demand in international criminal law for a universal, intuitive recognition of justice by judges, *because* they are judges. Failure to administer such is an international crime. In cases of torture or other *ius cogens* rights breaches, this is clear enough but doubts emerge when the criminality is in the ideology of the domestic legal system. It has already been demonstrated above that the claim of universality for a rights-based rule of law is unsustainable.

4.1.3 *Criminality of Legal Features Contra Rights-Based Rule of Law*

The key features of the Nazi system impugned were the erosion of predictability through use of a rule of analogy which discounted pre-1935 judicial interpretations, institutionalisation of double jeopardy through the filing of so-called

(p367), pp377-8. Woetzel also argues that *lex loci* is relevant “in order to determine the awareness of guilt:” above n16, p74. Article 32(2), *Rome Statute* now makes this a defence.

³⁸The Karlsruhe Appeal Court concluded that Public Prosecutor Fränkel could not be prosecuted since there was no evidence he had ever “doubted the validity of the regulations.” Investigation ceased without prosecution on 3 September 1964, discussed in Müller, above n16, p222.

³⁹Luc Huyse, ‘Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past’ (1995) 20 *Law and Social Inquiry* 51, at 60, and the references there cited. In the *Rehse Case*, the Bundesgerichtshof, for example, held that the Nazi judge was “independent under the then-valid law ... subject only to law and responsible to his conscience. His duty demanded that he follow only his own conviction of the law,” individualizing the consciousness of injustice in a way the *Justice Case* Tribunal refused: *Verantwortlichkeit des berufsrichterlichen Beisitzers des Volksgerichts* (Bundesgerichtshof Urt v. 30.4.1968 – 5 StR 670-67), reported in (1968) 21 *Neue Juristische Wochenschrift* 1339-40. It also addresses the defence argument raised at Nuremberg by the judge Schlegelberger, who submitted that he had attempted to ameliorate the worst impacts of Nazi laws: *Justice Trial*, Opening Statement for the Defendant Schlegelberger (by his counsel Dr Kubuschok), p126 et seq, citing the Transcript, pp4084-89.

⁴⁰*Dujail Opinion*, Part 2, p12, referring to Case 944/C/1984, Revolutionary Court.

⁴¹*Ibid.*

⁴²*Ibid.*, p39.

“nullity pleas,”⁴³ the receipt of torture-tainted evidence and abuses of process.⁴⁴ These procedural features were in addition to unlawful substantive statutes, which authorised torture, disappearances or discriminatory measures, and the establishment of a range of special or extraordinary courts, which the Tribunal also considered in breach of the international prohibition on war crimes and crimes against humanity.⁴⁵ The IHT trial, although it necessarily criticised practice in extraordinary courts, especially the Revolutionary Court in the Saddam regime, did not find Iraqi laws criminal, but instead criminalised the failure to apply them in the trial of 148 Dujail villagers in 1984 as a crime against humanity, holding that no real ‘trial’ had taken place and therefore the sentences of death amounted to judicially ordered murder.⁴⁶ They concluded that the evidence was condemnatory on all these factors, that there was no trial in the required sense of the word and therefore the Revolutionary Court action was “an order for murder” and not a judicial decision.⁴⁷ The illusory character of the trial was taken as evidence of Awad Hamad’s constructive knowledge of injustice, while signing the sentencing document caused the commission of murder.⁴⁸

The principle of law relied on by the Nazi judicial system was *Gesetz ist Gesetz* or ‘law is law,’ leaving it “defenceless” in face of wicked or criminal laws⁴⁹ although it has been suggested that characteristically awkward and ambiguous language in Nazi statutes left them open for results-oriented jurisprudence.⁵⁰ International rule of law theory, however, values predictability and certainty in law. Further, the criminality of Nazi ideology is interesting when, *ius cogens* breaches aside, the effect of that ideology on international law is considered, challenging its

⁴³See Matthew Lippman, ‘The Prosecution of Josef Altstoetter et al’ (1998) 16 *Dick J Intl Law* 343, at 382 et seq.

⁴⁴Defendant Klemm was accused of receiving evidence which he “must have” known was procured by torture: *Justice Trial*, Opinion and Judgment, pp1093, 1097.

⁴⁵For example, Schlegelberger bore primary responsibility for criminal decrees which he had signed, including the so-called *Nacht und Nebel* (Night and Fog) decree, authorising disappearances: *ibid*, p1083; he was also found to have committed war crimes by establishing discriminatory legislation against Poles and Jews in the Occupied East (pp1083-5). The involvement of the judiciary in acts of this kind was especially colourable (pp1086-7).

⁴⁶The evidence relied on for this finding included the brevity of the trial, the defendant’s failure to confirm the number or identity of the defendants or their ages since a large number were in fact minors, the passage of sentence on persons already dead in interrogation (*Dujail Trial*, Opinion, p21), the making of findings patently in disregard of the evidence before it (p15, 19) and submission to executive direction in the result (pp13-15).

⁴⁷*Dujail Trial*, Part 2, p21, also p28.

⁴⁸*Ibid*, p28.

⁴⁹Kastner, above n16, FN33. See generally also Lippman, above n43.

⁵⁰Lippman, *ibid*, at 382.

foundational principles by defining the nature of the state in terms of the “organic, natural entity” of the *Volk*, rather than its physical characteristics.⁵¹ It also “radically revised” the judicial role,⁵² allowing ideology to permeate it to the extent of turning it effectively into a quasi-judicial administrative structure responding to regime directives.⁵³ So, to be valid at international law, it seems, a “legal code must be firmly rooted in the liberal tradition.”⁵⁴

4.1.4 *Humanitarian Intervention to Restore Rule of Law Judicial Institutions*

The two major trials imposing criminal responsibility on judges for actions in the domestic legal sphere are inconclusive in establishing a right to intervene on humanitarian grounds. The IHT conviction of Awad Hamad, in particular, focused not on the legality of the domestic legal system but on the failure in an identified case to apply standards required by the domestic as well as the international system. Further, it explicitly considered that the role of custom in the international sphere meant that “the concept of law is not identical in the international and national scopes. In the national scope, the law in action is issued by a legislative authority.”⁵⁵ However, there are indications which, in the prevailing climate favouring rule of law interventions, are troubling.

To the extent that the IHT supports humanitarian intervention it is on the basis of egregious violations of the right not to be arbitrarily deprived of life.⁵⁶ Arbitrariness could, by extrapolation, have been avoided by compliance with domestic law. The *Justice Trial* has a number of highly problematic aspects, in particular the universal ‘consciousness of injustice’ as a result of judicial office, as an element of the crime against humanity. Requiring individual consciousness as a test of criminality makes the condemnation of an entire legal system outside the Nazi

⁵¹Detlev Vagts, ‘International Law in the Third Reich’ (1990) 84 *AJIL* 661, at 687-90. Compare Article 1, *Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States*, 26 December 1933, Montevideo, 165 UNTS 19, entered into force 26 December 1934, for the standard definition of statehood.

⁵²Lippman, above n43, at 356.

⁵³*Justice Trial*, Opinion and Judgment, pp1024-5.

⁵⁴H.F. von Haast, ‘A Second Nuremberg Trial’ (1948) 24 *NZLJ* 67, at 68.

⁵⁵*Dujail Opinion*, Part 1, p39.

⁵⁶Article 6(1), *International Covenant on Civil and Political Rights 1966*, adopted by General Assembly Resolution 2200 (1966), A/RES/2200A XXI, 999 UNTS 171, entered into force 23 March 1976 (“ICCPR”).

context difficult to establish sufficiently to justify armed intervention to restore it to the judiciary. Such intervention was not called for in Somalia, where, twenty years prior to UN intervention, the Supreme Revolutionary Council under Muhammad Siad Barre established a system of special security courts for political crimes in which sat judges appointed by the Council.⁵⁷ Nor was it called for in 2001 when Indonesia's former Attorney General admitted corruption was so entrenched in the judiciary it amounted to a "mafia."⁵⁸ Calls to expand humanitarianism to include the rule of law and human rights generally⁵⁹ have not yet been matched with state practice.

However, broader authority to intervene from the UN Security Council to restore international peace and security might include scope to intervene in the domestic judicial structure, as part of the security mission to restore 'international peace and security' if not its sole objective. The link between security as conflict resolution and judicial intervention, particularly seeking accountability for past international crimes through 'transitional justice,' has been asserted in Rwanda and East Timor.⁶⁰ However, this depends largely on restrictions applying to the mission by general principles of international law, including international humanitarian law, and therefore the rule of law character of the interveners.

4.2 The Application of International Humanitarian Law and / or Occupation Law to Military Interventions Authorised by the Security Council

The relatively stable conception of international humanitarian law since 1949 that conflict will involve two parties, whether international in character or otherwise, has to some extent been overtaken by the prevalence since the 1990s of operations

⁵⁷See comments on the pre-UNOSOM judicial system in Kelly, above n13, para 710.

⁵⁸*The Jakarta Post*, 6 July 2001, cited in Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, Springer, Berlin, 2005, p140.

⁵⁹Kelly includes the prevention of genocide, prevention of famine and restoration of 'law and order' as justifications: Kelly, above n13, p5; de Mello, above n14, p18. De Mello was at that time Head of Civil Affairs, UNPROFOR, and considered UNSC Resolution 688 (1991) as the first move towards realising this, while Rwanda marked an 'abdication.' He defined the rule of law as "democratisation, 'good governance' through institution-building, constitutional and legal reforms, information and education, elections:" *ibid.*

⁶⁰Statement of President of Rwanda, Pasteur Bizimungu, to UN General Assembly, U.N. GAOR, 51st Session, U.N. Doc. A/51/PV.78 (1996), p5; Othman, above n58, p149.

undertaken under UN auspices and further expansion is predicted.⁶¹ UN operations are typically divided into peacekeeping operations, governed by the consent of the parties, UN neutrality and minimum force in self-defence as set out in the authorising Security Council Resolution,⁶² and peace enforcement operations. The latter emerged around the time of the Rwandan genocide, as operations broader than neutral peace-keeping supervision including the restoration or establishment of public security, for example to allow the distribution of humanitarian assistance⁶³ and to prepare the territory for transition to democracy.⁶⁴

The model for such intervention varies broadly from a 'light footprint' where core administrative functions remain in the hands of the host state, such as in Iraq⁶⁵ and Afghanistan, to the vesting of "all of the classical powers of the state, including the administration of justice" in the UN force, as in Kosovo and East Timor, and a mix of the two as in Cambodia. The UN interveners might be placed under national command with UN authority, or overtly as a UN force.⁶⁶ In all the variations, most recent interventions feature "the direct involvement of international actors in the restoration of justice and the rule of law in post-conflict territories" to fill domestic lacunae in the domestic judicial structure generally and the specific concern of transitional justice, whether conducted purely by the interveners or in conjunction with a (consenting) domestic authority.⁶⁷ However, there are some variables in the applicable body of authorising law, which are addressed in turn below.

⁶¹Cornelio Sommaruga, Preface to Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p1), pp5-6.

⁶²Introduction to Palwankar (Ed), *ibid*, p7. For example, Boutros Boutros-Ghali, UN Secretary General, spoke of operations "hitherto with the consent of all the parties concerned" in *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 – S/24111, 17 June 1992, para 20. Neutrality was fostered by the involvement of many nations from all geographic areas: Lieutenant-General Lars Erik Wahlgren, 'Operational Tasks of Peace-keeping Troops' in Palwankar (Ed), *ibid*, (p12), pp14-5.

⁶³Introduction, *Symposium on Humanitarian Action*, above n62, p8.

⁶⁴Wahlgren, above n62, p12.

⁶⁵On the end of occupation on 28 June 2004, Coalition forces did not hand over to a UN-mandated transitional authority but to an interim Iraqi government. The Security Council continued to authorise Coalition intervention but it was in the first class of 'light footprints' discussed above. Resolution 1546 (8 June 2004) established a mandate for two organisations in Iraq after the transfer of government authority, not just to assist in the Iraqi transition but to ensure "regional stability:" the advisory United Nations Assistance Mission in Iraq (UNAMI), and the security-driven Multi-National Force-Iraq (MNF-I): Prefatory remarks.

⁶⁶See note 2 above.

⁶⁷Instead of distinguishing traditionally between judicial intervention and transitional justice to deal with the (international) crimes of a deposed regime, Stahn considers the administration of justice by a

Before turning to instances of actual Security Council authority to intervene, it is necessary to address arguments that the support offered to the original United-States led occupation of Iraq in 2003-4 in Resolution 1483 (2003) may not in fact have confirmed the application of the law of occupation but instead “created a partial exception from the regime of occupation, authorising the [Coalition Provisional Authority] to engage in far-reaching law reform.”⁶⁸ This, says Stahn, is a characteristic ambiguity of Security Council direction affecting the process of judicial reconstruction.⁶⁹ However, the problem in that case seemed rather to be a disjunct between the hortatory outcomes the Security Council sought from the occupant, phrased in terms like ‘promote’ and ‘assist,’ and the mandatory limitations of applicable occupation law.⁷⁰ For this reason, Scheffer preferred an explicit “tailored nation-building effort” by the Security Council, in which relevant principles of occupation law “particularly humanitarian and due process norms” could be combined with broader international legal concepts, such as “human rights, self-determination, the environment and economic development so as to create a legal regime uniquely suitable for the territory in question.”⁷¹ This depends on an emerging concept of intervention with Security Council authority capable of activity, possibly coercive, to achieve such goals.

transitional authority, such as the UN, as a “separate paradigm,” broader than the creation of special tribunals to address international crimes: Carsten Stahn, ‘Justice under Transitional Administration: Contours and Critique of a Paradigm’ (2005) *27 Hous J Intl Law* 311, at 312-4. Newton goes further and argues that rebuilding the domestic judicial structure should be the “first priority”: above n1, at 244.

⁶⁸Stahn, *ibid*, at 321. In particular, paragraph 4 called on the Coalition Provisional Authority (“CPA”), “consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.” Scheffer points out that this goal, “though laudable ... cannot be achieved through occupation law alone,” noting that as well as identifying occupation law as applicable generally, the prefatory remarks ‘noted’ the involvement of “states that are not occupying powers” with the CPA, indicating that the law of occupation applied to them regardless of their actual status as occupants: David J. Scheffer, ‘Agora (Continued): Future Implications of the Iraq Conflict’ (2003) *97 AJIL* 842, at 844.

⁶⁹Stahn, *ibid*, at 321.

⁷⁰Assistance to local authorities or communities is not precluded by occupation law, although permanent structural changes without consent are: see sections 2.3.3-4, Chapter Two above.

⁷¹Scheffer, above n68, at 843.

4.3 Security Council Authorisations under National Command with Host State Consent

There is a school of argument that the 1949 Geneva *Convention IV Relative to the Protection of Civilian Persons in Time of War* (“Geneva IV”)⁷² was intended to apply to all situations where another state is in control of territory, regardless of the existence of armed conflict, including the various kinds of UN operations.⁷³ Since Article 4 of Geneva IV refers to persons “in the hands of” an occupying power, the test of occupation is said to be simply one of “effective control” of the territory.⁷⁴ Roberts, however, argues that the test for the application of occupation law also includes non-consensual presence (for if there is consent, it will govern the terms of the foreign presence), and a pragmatic need for the continuation of daily administration despite the unlawfulness of the foreign presence.⁷⁵ Aside from the unlawfulness of the intervention, this could include effective control by a UN force under national command since these rules represent custom binding on all states. However, problems of coherence and effectiveness in traditional rule of law terms arise when the UN force does not exercise effective control, or does not exercise effective control over the entire territory,⁷⁶ especially should they attempt to exercise the limited scope occupation law allows to intervention in the domestic judicial administration.

⁷²12 August 1949, Geneva, 75 UNTS 287, entered into force 21 October 1950.

⁷³Kelly points out that Geneva IV “was designed to regulate the relationship between foreign military forces and a civilian population where the force exercises the sole authority or is the only agency with the capacity to exercise authority in a distinct territory.” Article 2, and the explicit clarification in the *1947 Report of the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (14-26 April), Geneva, International Committee of the Red Cross, 1947, which would have the Convention applying “also in the event of territorial occupation in the absence of any state of war,” support the view: Michael Kelly, ‘Military Force and Justice’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p229), pp232-4. For example, the rules of occupation applied to the United Kingdom in Persia during the First World War, even though Persia remained neutral:” *Chevreau Arbitration* [1931] 2 RIAA at 1123.

⁷⁴Kelly, ‘Military Justice,’ *ibid*, p235.

⁷⁵Adam Roberts, ‘What is a Military Occupation’ (1984) 55 BYBIL 249, at 305.

⁷⁶For example, the area of Somalia under the control of UN forces during UNITAF/UNOSOM II, compared to the transitional authority operating across the state in Cambodia under UNTAC: Kelly, ‘Military Justice,’ above n73, p238.

Where UN forces operate under national command,⁷⁷ for example when the UN Security Council invites a state to conduct an intervention on its behalf, they are bound by their own obligations under international law.⁷⁸ Thus, where the mandate is defined by Security Council authority for intervention in a domestic conflict, eg Korea, Somalia (UNITAF) and Rwanda (UNAMIR), then international humanitarian law as it applies in international armed conflicts operates between the interveners and the local forces, potentially including occupation law.⁷⁹ Part of this will be the obligation to participate in transitional justice by pursuing justice for grave breaches of the Geneva Conventions in its own territory or territory under its control through occupation.⁸⁰ This is demonstrative of the primacy of domestic jurisdiction, which was insisted upon in the negotiation of Geneva IV.⁸¹

The case of Iraq is illustrative. The Coalition in the new form of the Multi-National Force-Iraq (MNF-I) was authorised to take “all necessary measures to contribute to the maintenance of security and stability in Iraq,” as requested by Iraq.⁸² As an indigenous government remained in legislative control of Iraq, and the MNF-I presence was regulated by consent (even if in the form of agreement to the Security Council’s “all necessary means” authorisation), the MNF-I was not in effective administrative control and therefore did not attract, or indeed assert, the de facto administrative authority of the occupant.

⁷⁷UNAMIR, for example, was a consensual intervention, in which forces under national command agreed to “co-operate” with the UN Secretary General to achieve the designated mission (UNSC Res. 872 of 1992 and 929 of 1994): Daphna Shraga and Ralph Zacklin, ‘The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues’ in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p39), p41.

⁷⁸Toni Pfanner, ‘Application of International Humanitarian Law and military operations undertaken under the United Nations Charter’ in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p49), p55.

⁷⁹Ibid. Domestic authority to act or to appropriate funds for the intervening state may also be required. For example, the US *Foreign Assistance Act* proved critical to rule of law programs in Haiti: Newton, above n1, at 254.

⁸⁰Article 146, Geneva IV; Newton, above n1, at 241, citing as examples NATO’s intervention in Bosnia-Herzegovina, and the Coalition’s obligation to prosecute Saddam Hussein for various offences committed against Iran and Kuwait. This was achieved through delegation to the Iraqi Governing Council: *CPA Order 48*, above n17.

⁸¹Newton, above n1, at 244; Jean Pictet, *The Geneva Conventions of 1949: Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, at 586, unless another state has physical custody of the suspect.

⁸²Article 10, UNSC Resolution 1546 (2004). The letters attached as Annex A set out the Iraqi request, which is specifically for “security” assistance and seek “an effective and cooperative security partnership” between the multi-national force and the sovereign Iraqi government: Text of letters from the Prime Minister of the Interim Government of Iraq Dr Iyad Allawi and United States Secretary of State Colin L. Powell to the President of the Council, 5 June 2004. The intervention was to be reviewed after twelve months or withdrawn on request: Article 12.

Further, the MNF-I asserted and was not denied a need to continue to operate under the existing framework as to their status and jurisdiction and declared that it would abide by international humanitarian law,⁸³ although the occupation was declared ended.⁸⁴ The undertaking was noted by the Council in the preface to Resolution 1546 as “obligations under international humanitarian law.” It is not quite the situation proposed by Adam Roberts, where international humanitarian law applies under Resolution 1546,⁸⁵ because of the lack in 2004 of a traditional form of armed conflict, but one where the rules are voluntarily observed; had the MNF-I been in effective control of Iraq, however, occupation law could have applied.⁸⁶ The terms of the consent therefore governed the intervention, subject to the broad restrictions of humanitarian law regarding combat interactions.

The MNF-I mandate commenced in a situation of “huge insecurity” accompanying the transfer of authority,⁸⁷ leaving broad potential scope for action. However, the ‘rule of law’ does not appear in the MNF-I mandate or in the requesting letters, notwithstanding the ‘affirmation of its “importance,” along with reconciliation, human rights and democracy.⁸⁸ Given the terms of the mandate, court and judicial intervention measures implemented or supported by the MNF-I were predicated on the necessary link between, on the one hand, judicial, rights-based institutionalism and the rule of law, and on the other, the rule of law and security –

⁸³Letter of Colin Powell, US Secretary of State, to the President of the UN Security Council, 5 June 2004, annexed to UNSC Resolution 1546 (2004), Annex A. This was acknowledged in the prefatory remarks to Resolution 1546 and Article 9 which reaffirmed the provisions of Resolution 1511 (2003). It should be noted that, after the transfer of governmental authority, the CCCI’s lack of jurisdiction to compel the production of foreign military forces to the court continued: section 17(2), *CPA Order 13: Central Criminal Court of Iraq (Revised) (Amended)*, entered into force 22 April 2004; section 2(8), *CPA Order 100: Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, entered into force 28 June 2004.

⁸⁴Prefatory remarks, UNSC Resolution 1546 (2004).

⁸⁵Adam Roberts, *The End of Occupation in Iraq*, 28 June 2004, International Humanitarian Law Research Initiative, <http://www.ihlresearch.org/iraq/feature.php?a=51>, viewed 4 April 2009.

⁸⁶*Ibid.*

⁸⁷*Ibid.* Indeed, the first executive order issued by the new Iraqi government permitted the Prime Minister, “with the unanimous approval of the Presidency Council,” to declare a state of emergency, suspending a variety of rights, in response to grave danger from “an ongoing campaign of violence by any number of people” to prevent democratic development or any other purpose: Article 1, *Order 1/2004: Safeguarding National Security* (translated by the Law and Order Task Force (“LAOTF”), reproduced by permission, copy on file with the author). A 60-day state of emergency across Iraq, except the Kurdish provinces, was declared on 7 November 2004: Human Rights Watch, *World Report 2005: Country Summary: Iraq*, 13 January 2005, available at <http://www.HumanRightsWatch.org/legacy/english/docs/2005/01/13/iraq9805.htm>, viewed 18 October 2009, p3.

⁸⁸In his letter, Colin Powell declared MNF-I “ready as needed to participate” in humanitarian assistance and civil reconstruction: Annex A to UNSC Resolution 1546 (2004).

linkages which must be subjected to close scrutiny because they are made in all forms of intervention discussed in this Chapter.

4.3.1 *Security through Direct Participation in Judicial Process: CCCI-K*

The CCCI's institutional jurisdiction was enlarged by the interim government, which directed it to review major crimes committed during a state of emergency.⁸⁹ The measure was said to be, *inter alia*, "in support of the rule of law and the independence of the judiciary, its effectiveness and monitoring" and "the firm necessity to counter terrorists and law breakers." These comments were phrased around declarations regarding the government's commitment to the "guarantee" of various human rights.⁹⁰ This will be of significance in assessing the security/rights-based rule of law link.

MNF-I continued the reconstruction efforts through the CCCI-K commenced under occupation through Task Force 134, which 'assisted' the Iraqi authorities with criminal prosecutions.⁹¹ Task Force 134 comprised a "headquarters element, a magistrate's cell, the combined review and release board (CRRB) review section, and the CCCI liaison office." Most sections conducted substantive legal review tasks for detainees in MNF-I administrative detention. The CCCI Liaison Office, staffed with US military lawyers, was responsible for 'facilitating' prosecutions before the CCCI-K.⁹² This included the same capacity to request the investigative judge to ask questions that is accorded to Iraqi lawyers, although Task Force 134 personnel were critical of the rule of law effect of having to make a request, but not representation at trials, although hearings and decisions were tracked.⁹³ The role was evidently a continuation of Coalition involvement at the CCCI-K during the occupation period,

⁸⁹Major crimes included murder, robbery, rape, kidnapping, destruction, bombing/burning/damage of property, possession of military weapons and ammunition, or manufacturing, transportation, smuggling or trafficking of such weapons: see Article 7(1-2), *Order 1/2004: Safeguarding National Security* (Iraq). The Order referred to Central Criminal Court of Iraq ("CCCI") not the Central Criminal Court of Iraq-Karkh, leaving the way open for the establishment of additional 'CCCI's,' as in fact occurred: see further note 14, Chapter Three above.

⁹⁰*Order 1/2004: Safeguarding National Security*.

⁹¹Major W. James Annexstad, 'The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants – A Look at the Task Force 134 Process and the Future of Detainee Prosecutions' (2007) *Army Lawyer* 72, at 73.

⁹²*Ibid*, at 74. In the case of prosecutions, Annexstad claimed that the MNF-I role was "vital" and the strength of the case rested with the evidence collected by military units in the field, in a clear reflection of the on-going participation in prosecutions, as opposed to 'assistance:' at 75

⁹³Human Rights Watch, above n87, p12; and see Annexstad, *ibid*, at 78. The results were passed to the detaining MNF-I units.

although primarily concerned with the intersection of the CCCI-K's jurisdiction, particularly over those accused of crimes against Coalition forces, and MNF-I administrative detention.

4.3.2 Security through 'Building Judicial Capacity:' CCCI-Rusafa

In line with the abrogation of Coalition legislative capacity, and in a significant departure from the origin of the CCCI-K in CPA Order 13, the Central Criminal Court of Iraq – Rusafa (CCCI-R) was established by decree of the Iraqi High Judicial Council on 2 May 2007.⁹⁴ It shared the same legal jurisdiction over major crimes as the CCCI-K, although its geographical jurisdiction was originally limited to its own administrative district (Rusafa). This was quickly amended to a federal criminal jurisdiction to enable the CCCI-R to be the court of review for the entire detainee population in the Rusafa Temporary Detention Facility, housed in the same complex.⁹⁵ This is necessarily a simultaneous criminal jurisdiction with the CCCI-K.

The CCCI-R was therefore, on its face, an instrument of permanent domestic judicial reform. However, it replicated the model of the CCCI-K and appears to have originated, with its associated MNF-I advisory body the Law and Order Task Force (LAOTF), in an MNF-I proposal.⁹⁶ LAOTF's purpose was to "help build Iraqi judicial capacity" and to provide the CCCI-R judiciary with "a secure environment"

⁹⁴High Judicial Council, Department of Judicial Affairs (مجلس القضاء العالي قسم شؤون القضاة), Judicial Order 56/Q/A (56/أق), dated 2 May 07 (translated by LAOTF, reproduced by permission, copy on file with the author).

⁹⁵High Judicial Council, Department of Judicial Affairs, Judicial Order 65/Q/A (65/أق), dated 27 May 2007 (translated by LAOTF, reproduced by permission, copy on file with the author). Its original jurisdiction did not encompass the majority of the detainees in the Rusafa Temporary Detention Facility (RTDF), because their place of arrest was outside the Rusafa area, and the *Criminal Procedure Code 23/1971* allocates jurisdiction on the basis of geographic location: paragraph 53. As a high capacity temporary facility, RTDF was intended as a centralised pre-trial detention centre for those charged with major crimes, particularly in the aftermath of the 2007 surge in MNF-I troops: Michael R. Gordon 'In Baghdad: Justice Behind the Barricades,' *New York Times*, 29 July 2007, available at <http://www.nytimes.com/2007/07/30/world/africa/30iht-30military-web.6889642.html>, viewed 18 October 2009.

⁹⁶LAOTF was reportedly floated as an idea to the MNF-I commander, General Petraeus, by his Staff Judge Advocate, Colonel Mark Martins, in February 2007 and LAOTF personnel were in place by mid-May, noting that the CCCI-R was decreed only on 2 May: Michelle Tan, 'Task Force Puts Iraqi Courts Back to Work,' *Army Times*, 12 November 2007, available at http://www.armytimes.com/news/2007/11/army_safehouse_071112/, viewed 18 October 2009.

to perform their duties transparently.⁹⁷ It included a direct investigative role in major crimes through four assigned Iraqi investigators, exercising their authority under Iraqi law and assisted by US federal agents and military investigators.⁹⁸

In part, the LAOTF intervention was necessitated by a predicted spike in detainee numbers as a result of the so-called MNF-I ‘troop surge’ and implementation of the Baghdad Security Plan in response to pervasive unrest and sectarian violence in early 2007.⁹⁹ The provision of security, reconstruction of facilities and funding for contractors to do the same are within the volunteered competence recognised in UNSC Resolution 1546.¹⁰⁰ Thus, for example, MNF-I assisted with the secure compound, which included the CCCI-R, secure accommodation for judges and their families, the Rusafa Temporary Detention Facility (RTDF) which was intended to become Baghdad’s primary pre-trial detention centre, and the Baghdad Police College. A substantial new building was opened in September 2008.¹⁰¹

⁹⁷LAOTF Director Mr Mike Walther, 29 October 2007, quoted in Tan, *ibid.* Tan also reports that in 2007 LAOTF comprised 50 military and 75 civilian lawyers, paralegals and investigators, including personnel from the United Kingdom and Australia.

⁹⁸LAOTF Director Mr Walther, quoted in Tan, *ibid.* The FBI was also involved in the Joint Investigative Force, established in 2006, utilising “hand-picked” and screened (by US forces) Ministry of Interior investigators and an embedded Investigative Judge. The FBI assisted with forensic evidence collection, in place of the traditional emphasis on investigation by confession: Dina Temple-Raston, ‘Elite Iraqi Task Force Probes Sensitive Crimes,’ NPR, 26 March 2008, available at <http://www.npr.org/templates/story/story.php?storyID=89123960>, viewed 18 October 2009. The emphasis on forensic evidence responded to Coalition concerns, expressed by Mr Phillip Lynch, Role of Law Coordinator, US Embassy, that the judges’ preference for intuitive assessment of witnesses’ veracity, rather than examining in depth photographs and physical evidence, amounted to “soothsaying truth and falsehood.” quoted in Dina Temple-Raston, ‘Iraqis on Slow Road to Building Judicial System,’ NPR, 27 March 2008, available at <http://www.npr.org/templates/story/story.php?storyId=89162530&ps=rs>, viewed 18 October 2009. Annexstad sees this as a failing of the inquisitorial system itself: above n91, at 73. As discussed further below, this does not reflect the impact of an overwhelming lack of security in obtaining such evidence.

⁹⁹In Rusafa, the detainee population rose rapidly in 2007 from 2500 to 7000: Tan, *ibid.* UNAMI reported an increase in the country-wide total of detainees in Iraqi government custody from 17 565 in March 2007 to 25 007 by November: *UNAMI Human Rights Report 1 January – 31 March 2007*, para 58, available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf>, viewed 26 April 2008, and *UNAMI Human Rights Report 1 July – 31 December 2007*, available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jul%20Dec%202007%20EN.pdf>, viewed 26 April 2008, para 57.

¹⁰⁰Para 10 provides “authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”

¹⁰¹The Justice Palace includes a court house, witness security facility (apartments for 150 witnesses), offices and conference rooms, including for the High Judicial Council: Kendal Smith and Polli Keller, ‘New Court House Opens in Baghdad,’ US Army Corps of Engineers Press Release, 10 September 2008. A second, US\$21 million dollar facility was opened in Ramadi (Anbar province) in 2009, but reports in August suggested that it was beset by the same problems as the Rusafa complex, including corruption according to United States military personnel, lack of evidence and forced confessions

MNF-I measured the success of the CCCI-R in overt rule of law indicators, arguing that LAOTF assistance to the court was assistance to the Iraqi government in implementation of the rule of law.¹⁰² The dominating principle of sovereignty in international law means that where such assistance is by true consent of the Iraqi government, then there is no issue of unlawfulness under the terms of the MNF-I mandate. The acceptance of the CCCI structure, replicated from the CCCI-K to the CCCI-R, and of the secure facilities, indicates consent, and there is no apparent objection to the advice provided by LAOTF and even the participation of Task Force 134 in judicial process. However, the overt linkage between the rule of law measures and security in Iraq is not self-evident, and, lacking consent, would be of concern in future operations.

4.3.3 *The Link Between Efficient, Rights-Based Judicial Review and Security: CCCI Practice*

A series of practical problems and results have dogged both CCCI outposts, and their detention facilities,¹⁰³ remarkably consistently from 2004 to 2008.¹⁰⁴ On analysis, it is the lack of security which is primarily behind the criticisms of the CCCI judiciary and procedure, with the effect that rather than the existence of the rule law leading to peace and stability, it must be concluded pragmatically that order and security must precede the formation of the rule of law, however conceived.

according to the Iraqi judges, and police complaints that detainees were simply being 'let go.' In response, US Marines introduced a "monthly security conference" between Iraqi stakeholders in July: Jane Arraf, 'Ramadi struggles to instill a rule of law,' *The Christian Science Monitor*, 21 August 2009, available at <http://www.csmonitor.com/2009/0821/p06s23-wome.html>, viewed 8 September 2009.

¹⁰²See telephone interview with Colonel Mark Martins, Staff Judge Advocate MNF-I, Baghdad, reported in Austin Bay, 'Quiet Step for the Rule of Law,' *The Washington Times*, 12 April 2007, available at <http://www.washingtontimes.com/news/2007/apr/12/20070412-085639-2020r/print/>, viewed 19 January 2009.

¹⁰³In the period of UNSC authority for MNF-I to 31 December 2008, the CCCI-K focussed on MNF-I detainees from Coalition detention centres, including Camp Cropper, near Baghdad Airport, and Camp Bucca, located in the south near Basrah, although it also heard matters referred by the Ministries of the Interior and Justice: Human Rights Watch, *The Quality of Justice: Failings of Iraq's Central Criminal Court*, 14 December 2008, available at <http://www.HumanRightsWatch.org/en/reports/2008/12/14/quality-justice-0>, viewed 18 October 2009, p11. The CCCI-R drew primarily on the co-located RTDF.

¹⁰⁴See for example Human Rights Watch, 2005, above n87; Michael Moss, 'Iraq's Legal System Stagers Beneath the Weight of War,' *The New York Times*, 17 December 2006, <http://www.nytimes.com/2006/12/17/world/middleeast/17justice.html?ei=5090&en=7fa73a4895399700&ex=1324011600&partner=rssuserland&emc=rss&pagewanted=all>, viewed 13 October 2009; Temple-Raston, above n98 (article dated March 2008); Human Rights Watch, 2008, above n103 (article dated December 2008).

A summary of the criticisms against the Iraqi courts in the period of Security Council intervention focus on three areas: inadequate administrative and judicial procedures, inadequate realisation of human rights (in particular the right to defence counsel) and protracted delays. The situation ably illustrates the difficulties security causes for supporters of a non-derogable right to a fair trial matched with minimum procedural standards, such as in the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Right 1984*.¹⁰⁵ Principle 70 considered that certain procedural standards should never be derogable, including the public recording of persons in detention; the prohibition on “indefinite” detention or incommunicado detention “for longer than a few days;” availability of review of detention without charge; “fair trial by a competent, independent and impartial tribunal established by law;” trial of civilians by ordinary courts or, if strictly necessary, independent military courts; standards relating to defence including the presumption of innocence, right to information on charges, “adequate time and facilities to prepare the defence,” defence of choice or by legal aid, presence at trial, rights about witnesses and public trial unless “on grounds of security,” which “ensure a fair trial;” the creation of records of proceedings; and the exclusion of double jeopardy.¹⁰⁶

The current state of the law does not reflect the desire of Principle 70 for minimum non-derogable standards,¹⁰⁷ nor, as it will become apparent, are they reconcilable with a total absence of civil security. Indeed, analysing the right to a fair trial, the European Court of Human Rights considered that a test of the legitimacy of measures in derogation was whether the “the ordinary law,” including provision for normal courts, military courts or special courts, would “suffice” to restore order.¹⁰⁸ It was clearly within the contemplation of the court that lack of security could not always be resolved through minimum trial standards.

¹⁰⁵Principle 70(e), United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984). The Principles elaborate the right to a fair trial established in Article 14, ICCPR.

¹⁰⁶Principle 70(a-i), *ibid*.

¹⁰⁷See section 1.3, Chapter One above.

¹⁰⁸*Lawless v Ireland* (Application Nr 332/57) Pub EUR Court of HR, Series B (1960-1), a case concerning administrative detention in Northern Ireland; see also Subrata Roy Chowdhury, *Rule of Law in a State of Emergency*, Pinter Publishers, London, 1989, p106.

4.3.3.A Inadequate Administrative and Judicial Procedures

The security situation had direct impacts on the nature of evidence underpinning charges, particularly fostering a significant dependence on secret informants – where informants were both unwilling to identify themselves and to be examined by the court.¹⁰⁹ Where the witness responded to summons, scope for protection was available under the *Criminal Procedure Code 23/1971*,¹¹⁰ but a regular failure of witnesses to do so meant that cases were protractedly adjourned at the investigative stage. These failures were eventually dealt with domestically, by instruction of the High Judicial Council in November 2008 that such cases were to be dismissed if there was insufficient other evidence.¹¹¹ In that year, some cases were observed to be dismissed for this reason.¹¹²

If a rule of law outcome is ensuring a fair trial of criminal charges, then there appears to be failure of the community interest when the security situation is so lacking that witnesses feel unable to appear. At CCCI-K, MNF-I reported that local Iraqi witnesses “rarely – if ever” testified because of security concerns regarding their movement to the court and appearance, noting that evidence must be presented in person to be accepted.¹¹³ Human Rights Watch adds criminal detention without judicial warrant and on-going problems of coercive interrogation,¹¹⁴ which, with lack of counsel, by 2008 sometimes resulted in the dismissal of charges.¹¹⁵ Although critiques are directed to the manner in which the CCCIs addressed missing secret

¹⁰⁹Prime Minister’s Office, Republic of Iraq, *Reform Paper on the Detention System in Iraq*, July 2007, Part C: The Security Axis (translated by LAOTF, reproduced by permission, copy on file with author).

¹¹⁰Article 47(2), *Criminal Procedure Code 23/1971*, permits witnesses to request security where national security is involved or in other serious criminal matters; see also paras 152 (power to close hearings), 172 (power to accept a witness statement in lieu of appearance) and 215 (“absolute authority” in the judge to evaluate evidence).

¹¹¹Human Rights Watch, 2008, above n103, p32. Human Rights Watch attributed this to case overload and argued that witness safety in the prevailing security climate ought not to be determinative at the expense of the detainee’s right to question the evidence against them.

¹¹²*Ibid*, p21.

¹¹³Annexstad, above n91, at 77. A Human Rights Watch interview with a Legal Advisor to Task Force 134, Captain Brian Bill, on 12 May 2008 suggested that the security classification of evidence meant “only approximately 10 percent” of all MNF-I detainees faced CCCI prosecution: Human Rights Watch, 2008, above n103, p12, and see p18.

¹¹⁴Human Rights Watch, 2005, above n87, p4; Human Rights Watch, 2008, *ibid*, p19.

¹¹⁵See further Human Rights Watch, 2008, *ibid*, p28, who observed such a matter at the CCCI-K. Human Rights Watch considered these matters under the heading “administration of justice” and recommended in December 2008 that the criminal law be complied with, but also amended to address “international standards, notably by prohibiting torture and other mistreatment and the use of coerced confession as evidence: pp4-5.

informants, the real shortcoming is clearly the lack of physical security as a condition precedent to an effective judicial process.

The simple failure of administrative systems was identified by both Iraqi and public sources. A July 2007 Iraqi *Reform Paper* described the situation as “chaos,” including lost files, delays and lack of a central database, secret informant evidence, corruption and a failure to follow Iraqi detention and investigation procedure for MNF-I detainees.¹¹⁶ It also addressed a failure to follow required Iraqi procedures, including widespread arrest without, or without record of, judicial warrant or extensions.¹¹⁷ They proposed domestic resolution through a coordinating inter-Ministerial Committee and requesting MNF-I co-operate with Iraqi authorities to resolve MNF-I detentions, which they said did not comply with Iraqi detention and investigative requirements.¹¹⁸ Some MNF-I assistance was provided with record-keeping systems,¹¹⁹ and there was an MNF-I effort to supply computers, although reportedly unsuccessfully.¹²⁰

4.3.3.B Inadequate Realisation of the Right to Defence Counsel

The Iraqi Constitution, adopted by referendum in October 2005, provides a range of individual rights, including to be deprived of liberty only by decision of a competent judicial authority, to a fair trial, to freedom from torture and to defence counsel.¹²¹ There is a world consensus that this last right requires “adequate opportunity” and consultation should not be delayed.¹²²

¹¹⁶Prime Minister’s Office, *Reform Paper*, above n109, Part B: Judicial and Legal Axis. Significantly, the report identified the stakeholders in these popularly identified ‘rule of law’ issues as the High Judicial Council, the prosecution, and the Ministries of Defence, the Interior, Justice and Labour and Social Affairs (the last having responsibility for minors in detention).

¹¹⁷Ibid.

¹¹⁸Ibid. See also Human Rights Watch, 2008, above n103, p5, for their charge-or-release recommendations, which would not address the core issue.

¹¹⁹It appears largely by introducing checklist references, in English and Arabic. This indicates the problems encountered by MNF-I personnel simply because of the language barrier as the rest of the file was maintained, unsurprisingly, in Arabic only: for example RTDF file #6874 (dated 2005) (scanned copy held by LAOTF, reproduced by permission, copy on file with the author). The forms included a checklist for the investigative judge to make his decision to refer for trial, release, or require further investigation, and one for the Iraqi Corrections services headed ‘ICS Detainee Transfer Checklist.’

¹²⁰William McQuade, ‘Operation Hammurabi Information Technology: Metrics Analysis Report for Baghdad Courts (Iraq),’ *Army Lawyer*, 1 October 2006, p1.

¹²¹Articles 19 and 37(3), *Dustour Jumhuriyat-al-‘Iraq* (Constitution of the Republic of Iraq). It differed from the *Law of Administration for the State of Iraq for the Transitional Period 2004*, which

Defence counsel at both CCCIs reported corruption,¹²³ significant delays and a lack of access to their clients rendering the right nugatory, especially for MNF-I detainees held at great distance from Baghdad, and in Camp Cropper, where counsel reported limited access due to MNF-I security concerns.¹²⁴ Hearings at both courts tended to be the first opportunity for consultation and therefore the defence tended to be silent or perfunctory.¹²⁵ However, counsel also pointed out that the government legal aid rate was token and in practice took up to twelve months to be paid.¹²⁶ Critically, counsel who acted for accused insurgents were accused of being insurgents themselves, threatened so severely that many fled Iraq. In other cases, acquitted defendants (and lawyers) were kidnapped and/or murdered, almost at the gate of the prison.¹²⁷

Human Rights Watch suggested in 2008 that the right to defence was being compromised by “the lack of a vibrant and established culture of legal defense; and insufficient judicial oversight,” and called on international donors to fund legal aid.¹²⁸ A legal aid program supported by LAOTF with US funding from May 2008 suggested otherwise. The program provided salary, advice and logistic assistance to 25 defence lawyers working at the RTDF and reported early success in some

spoke of a right to engage “independent and competent counsel” as opposed to a “right of defense,” and a right to a “speedy and public trial.” Article 15(E-F).

¹²²Principle 8, *Basic Principles on the Role of Lawyers*, adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August – 7 September 1990, UN Doc.A/CONF.144/28/Rev.1 at 118.

¹²³For example at CCCI-K in 2006: Moss, above n104; see also Joseph Giordono, ‘Trying Insurgents in Iraqi Courts Seen as Big Step in Rebuilding Legal System,’ *Stars and Stripes (Mideast Edn)*, 26 December 2004, http://www.military.com/NewContent/0,13190,SS_122704_Court,00.html, viewed 13 October 2009.

¹²⁴Annexstad, above n91, at 80; Moss, *ibid*, reports judges of the CCCI-K in late 2006 told counsel that they were implementing Coalition policy in refusing to make orders for access to MNF-I detainees, although that was denied by MNF-I officials. Defence lawyers reported to Human Rights Watch that their main concerns accessing MNF-I detainees were their safety and the simple logistics of getting there. However, Human Rights Watch received comments from MNF-I detainee management personnel that defence counsel didn’t “want” to meet clients at the MNF-I centres: Human Rights Watch, 2008 above n103, p37, discussing comments to Human Rights Watch from Major-General Douglas Stone, head of detainee operations until June 2008, and CAPT Brian Bill, Task Force 134 judge advocate, 12 May 2008. See also Moss, *ibid*; Giordono, *ibid*.

¹²⁵Human Rights Watch, 2008, *ibid*, pp20, 33; Moss, above n104. CCCI-R practice was to assign counsel to an unrepresented defendant immediately upon confirming his identity at trial, and then to continue the trial forthwith: Human Rights Watch, 2008, *ibid*, Section VIII, adding that lawyers were often not present at all during investigative hearings.

¹²⁶Lori Hinnant, ‘Iraq’s Legal System Burdened by War’s Wake,’ Associated Press, Baghdad, 6 December 2007.

¹²⁷Moss, above n104; see also Giordono, above n123.

¹²⁸Human Rights Watch, 2008, above n103, p7.

matters.¹²⁹ However, their on-going concerns were all security-related: including long delays for files which were lost, were tampered with when requested by counsel or were simply inaccessible in violent areas such as Diyala province.¹³⁰

4.3.3.C Delays

Lengthy delays in pre-trial detention, appeals and the mandatory superior review of capital punishment were attributed directly to lack of security, along with long delays in release on completion of sentence or dismissal of charges. Such delays persisted for months and often years, contrary to the ICCPR requirement for trial “without undue delay.”¹³¹ Consequently, essential MNF-I witnesses had often left the country by the date of trial, creating further delay.¹³² Physical movement of witnesses and judges within Baghdad and to MNF-I facilities was inhibited, also causing adjournments.¹³³

The delays caused congestion and difficulties in the detention system which compounded problems in case flow,¹³⁴ not helped by the large volume of detainees being taken into custody as a result of civil insecurity, leading to further overcrowding, administrative failures, court overloading and even longer delays.¹³⁵

¹²⁹Sufficiently to justify LAOTF planning, reported in January 2009, for five more such clinics in Iraq and a renewal of the CCCI-R funding, due to expire in February 2009. The politics of a Shi’ite majority government and a predominantly Sunni detainee population at RTDF raised doubts for counsel about on-going funding from the Iraqi government. Interestingly, US funding was only obtained after long effort, said to be due to a preference for prosecution among military lawyers: Tina Susman, ‘Iraqis Languish in Crowded Jails,’ *Los Angeles Times*, 22 September 2008, available at http://www.articles.latimes.com/2008/sep/22/world/fg_detainees22, viewed 19 January 2009.

¹³⁰Lost file cases included misdemeanour charges for offences such as littering which resulted in “months or years” in pre-trial detention: Susman, *ibid*.

¹³¹Article 14(3)(c). For example, one detainee, convicted by al-Bayaa Misdemeanour Court in 2005 remained in detention twelve months after the expiry of his sentence in May 2006 – a letter from RTDF to the al-Bayaa court and the Ministry of Justice to ascertain the status of his case sent in May 2007 was returned in July, unable to be delivered because of the security situation, and an attempt to transfer the detainee himself to al-Bayaa for release was frustrated for the same reason shortly thereafter: RTDF File #6682 (translated by LAOTF, reproduced by permission, copies on file with the author). Iraqi law requires the return of a detainee to the arresting police unit for release, as well as manual confirmation that no further charges or investigations are pending. See also the BBC report on RTDF: BBC News, ‘Iraq’s Jails “Terribly Overcrowded,”’ 25 November 2008, available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/7748795.stm, viewed 19 January 2009, reporting a Ministry of Interior argument that overcrowding was due to the security crack-down.

¹³²Annexstad, above n91, at 77.

¹³³Prime Minister’s Office, *Reform Paper*, above n109, Part C: The Security Axis; Annexstad, *ibid*, at 80.

¹³⁴Annexstad, *ibid*. For Iraqi authorities, it led to undocumented and overcrowded temporary prisons in 2004-06, such as in Baquba: Moss, above n104.

¹³⁵In the first two and a half years, MNF-I alone detained 61 000 people, of whom 43 000 were released and 3000 referred for trial (resulting in approximately 1500 convictions): Annexstad, *ibid*, at

Iraqi authorities also saw the threat situation as limiting their capacity to detain suspects and coordinate between the judiciary and intelligence services.¹³⁶ The threat of assassination for an unpopular decision impacted judges' capacity to decide matters independently, thus the Rule of Law Complex was designed to alleviate this key handicap to independent decision-making by providing a secure compound of courts and accommodation.¹³⁷

A general amnesty for minor crimes, those which were not international crimes, were not terror-related or did not result in death or permanent injury, where the accused had suffered delays in the criminal process, was passed in early 2008.¹³⁸ However, its effect was disappointing compared to expectation in reducing the case backlog, especially at the CCCI.¹³⁹ The High Judicial Council attributed it to administrative failures,¹⁴⁰ but it was also due to the small proportion of amnesty grantees actually in custody.¹⁴¹ Amnesty is criticised as a measure in judicial

81. This is to be compared to reported case disposition - the High Judicial Council reported that 96% of 2006 criminal detentions were resolved: Gerry Gilmore, 'Iraqi Courts, Police Institute Rule of Law, Officials Say,' American Force Press Service News Articles, 13 August 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=47034>, viewed 19 January 2009. In 2007 the CCCI-K informed Human Rights Watch that it had dealt with 32 084 investigative cases (7447 referred for trial, 17 820 dismissed) and concluded 2875 cases - utilising 10 trial judges, 25 investigative judges and 15 judicial investigators: See further Human Rights Watch, 2008, above n103, p28, statistics provided on 15 May 2008. The figures are indicative of the size of the problem - to process this number of cases judicially necessarily requires a lowering of trial standard, which is in turn criticised as a failure of the rule of law.

¹³⁶Prime Minister's Office, *Reform Paper*, above n109, Part C: The Security Axis.

¹³⁷*Reform Paper*, *ibid*; Annexstad, above n91, at 80. William Gallo, Director Law and Order Task Force, as quoted in Dina Temple-Raston, 'Iraqis on Slow Road to Building Judicial System,' above 98.

¹³⁸It was to apply to persons held for more than six months without an investigative hearing or more than 12 without referral to trial: *Qanun al-'Afw al-'Aam* (General Amnesty Law) 2008, available at <http://www.niqash.org/intern/getBin.php?id=460>, viewed 4 April 2009. MNF-I argued that detainees in its custody were not subject to the amnesty: 'Coalition Forces Set to Release Former Detainee (Baghdad),' MNF Press Release, 14 April 2008, at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=18464&Itemid=128, viewed 4 April 2009.

¹³⁹Mr William Gallo, LAOTF Director, in an interview reported in Susman, above n129; see also Human Rights Watch, 2008, above n103, p2.

¹⁴⁰The High Judicial Council announced in July 2008 that 96 000 cases had been approved for amnesty by the Judicial Committee, but by September only 5-8000 had been released: Human Rights Watch correspondence with Western diplomat (name withheld) monitoring amnesty implementation, 9 September 2008, reported in Human Rights Watch, 2008, *ibid*, p14. The same diplomat reported anecdotal evidence of prison officials demanding payment prior to release under amnesty.

¹⁴¹It is thought only 25% of detainees eligible for amnesty were in custody. Further, a detainee might be amnestied on one charge but continue to be held on another: *ibid*, p15.

reconstruction because it sidesteps the court process which epitomises justice rather than expediency.¹⁴²

4.3.4 *The Link between Security and the 'Rule of Law'*

Annexstad, working at Task Force 134, correctly saw the only solution to the Iraqi situation as “stability,”¹⁴³ but not to the extent of his suggestion that “Once there is justice, peace will follow.”¹⁴⁴ Instead, security must precede deliberate efforts to create the (international) rule of law, or as a minimum go hand in hand, because rights-based, institutionalist models of justice cannot perform adequately without a minimum level of security. Without it, as Iraq demonstrates amply, administrative failures, procedural shortcomings, adequate access to counsel and timely case disposition are simply not possible. Indeed, both occupation law and Security Council authority recognise this by permitting means such as administrative detention for security purposes, which are contrary to the ‘rule of law’ international law demands be established in domestic legal systems.

MNF-I’s approach to the rule of law in Iraq centred on an independent, fair and efficient judicial system.¹⁴⁵ The view was shared with Human Rights Watch, who was critical of the CCCI’s failure to meet the standard, despite greater resources and than other elements of the domestic court structure.¹⁴⁶ However, reconsidering the initial Resolution 1546, the “importance of developing effective police” in maintaining “law, order and security” is explicitly identified and authorised, where

¹⁴²Helen Durham, ‘Mercy and Justice in the Transition Period,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p145), p145. But compare the North Atlantic Council (NAC) decision that military apprehension of suspects indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) would destabilise the region and undermine overall operational goals (security) by enhancing the status of the radical nationalist parties: Newton, above n1, at 237.

¹⁴³Annexstad, above n91, at 80.

¹⁴⁴Ibid, at 81. Compare Stanley Roberts, who considered the obstacles to judicial reconstruction in Iraq to conclude that “fundamental law and order” needed to precede assistance with judicial reconstruction: ‘Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq’ (2004) 33 *Hofstra LR* 367, at 391.

¹⁴⁵Gilmore, above n135, discussing an interview with Mr Jim Santelle, Justice Attaché at the US Embassy in Baghdad.

¹⁴⁶Indeed, Human Rights Watch asserted that the result was a “disturbing continuity” with the Saddam period: Human Rights Watch, 2008, above n103, p3. Human Rights Watch observers examined investigative files and attended investigative hearings at both the CCCI-R and the CCCI-K, spoke with counsel and defendants at the CCCI-R and CCCI-K (but not MNF-I detainees), and observed five trials at both courts: *ibid*, pp1-8.

the importance of the ‘rule of law’ is simply affirmed.¹⁴⁷ Instead, Resolution 1546 emphasises order and security, recognising the scope in international humanitarian law through Geneva IV and through the authority to “take all necessary measures” to restore security that interveners are permitted to take actions which are not consonant with the complete international rule of law institutional model, although minimum non-derogable human rights are observed. The primary authorised method is administrative detention for security purposes, an authority also available to occupants.

4.3.5 Administrative Detention for ‘Imperative Reasons of Security’ and its Rule of Law Effect

Although unpalatable to current rule of law thinking, intervention in present Security Council practice permits administrative detention outside the paradigm of criminal justice by trial. It is also consistent with the law and practice of occupation. It is these extra-‘rule of law’ methods which prevent a worsening of order through prison overcrowding and delays, and not the failure to establish “an adequate” judiciary alongside police reconstruction.¹⁴⁸ In the case of Iraq after the 2004 transfer of authority, the sheer volume of detainees in both MNF-I and Iraqi custody would not have required an ‘adequate judiciary’ but an extraordinary, ad hoc court structure, because the volume of criminality could not persist in a peaceful society – that is, the existing judiciary might be perfectly ‘adequate’ for a peacetime load but fails in time of emergency, apparently causing rule of law collapse. In these circumstances, reconstructive measures are likely to result in a court system which is not appropriate to the developing rule of law relationship. An emergency measure, recognisable as such, addresses the problem while ensuring that the scope remains for the subject community to develop a suitable expression of their ordered rule of law relationship.

In Iraq, MNF-I was authorised to take persons into administrative detention “for reasons of imperative security,” as contemplated in their acceptance of the Iraqi

¹⁴⁷Article 16 and prefatory remarks, respectively.

¹⁴⁸Kelly, above n13, para 767, where this view was expressed by Somali police as well as intervening forces. The National Security Council took a similar view, but was also concerned about the lack of resistance to political pressure demonstrated by the Iraqi judiciary, despite “technical” independence: see Moss, above n104.

request for assistance.¹⁴⁹ Its terms were promulgated in *CPA Memorandum 3 (27 June 2004) Revised - Criminal Procedures* before the transfer, and established a minimum standard of administrative review of detention.¹⁵⁰ Security detainees were to have the same access to the Ombudsman and the ICRC as criminal detainees.¹⁵¹ Demonstrating the different character and authority for the detention, a security detainee subsequently awarded a criminal penalty could not discount the period of administrative detention against his sentence nor could any security detainee seek an Iraqi judicial remedy against a failure to comply with the rights granted him in CPA Memorandum 3.¹⁵²

CPA Memorandum 3 must be understood on its terms as a security measure directed to “law and order” and the “administration of justice” rather than the rule of law.¹⁵³ In implementing CPA Order 7 it made some final changes to rectify some human rights issues in the *Criminal Procedure Code 1971*, including mandatory directions to an accused about his right to silence and to representation, but in recognition of the need to transition to local control.¹⁵⁴ Additionally, national MNF-I contingents were given powers of criminal arrest (as opposed to administrative detention) to be “handed over” to Iraqi authorities, unless retained in MNF-I detention at Iraqi request.¹⁵⁵ It is directed to the practicalities of security in a deteriorating security environment, rather than systemic reforms towards an ideal judicial structure.

¹⁴⁹Letter of Colin Powell to the UN Security Council, Annex A to UNSC Resolution 1546 (2004).

¹⁵⁰The justification for detention was subject to review after 72 hours, with further review at six monthly intervals thereafter. Internment commenced after 30 June 2004 could persist for so long as imperative security needs required it, but detainees were to be transferred to Iraqi custody or released at the expiry of 18 months unless an application for extension was made to the Joint Detention Committee: section 6, *CPA Memorandum 3 (Revised): Criminal Procedures*, entered into force 27 June 2004 (“*CPA Memorandum 3*”). Note that minors were to be released after 12 months. Memorandum 3 drew explicitly on the authority of UNSC Resolutions 1511 (2003) and 1546 (2004) as “part of the CPA’s obligation to restore law and order.”

¹⁵¹Section 6(7-8), *CPA Memorandum 3*.

¹⁵²Section 6(9-10), *CPA Memorandum 3*.

¹⁵³Prefatory recitations.

¹⁵⁴Sections 1, 3(b-c) and 4, *CPA Memorandum 3*, respectively.

¹⁵⁵In such a case, section 5 goes on to provide certain minimum rights standards, and a maximum of 90 days in the detention facility without judicial review: *CPA Memorandum 3*. It also grants access to the Iraqi Prisons and Detainee Ombudsman and the ICRC unless temporarily denied for reasons of imperative military necessity” (section 5(1)(e-f)). However, again an MNF-I failure to observe the enunciated rights requirements was directed not to be a ground for legal remedy: section 5(2). The period of pre-trial detention, however, could be discounted from any final sentence.

In practice, the MNF-I reportedly in-processed all detainees alike in bureaucratic terms, deciding the character of their detention on initial review of their file.¹⁵⁶ The Task Force 134 Magistrate's cell took responsibility for administrative review of files with a view to referral to the CCCI-K for criminal prosecution, although the review was reported to be "largely subjective" in the lack of firm criteria. Dismissal of prosecution files at this stage was said to be 'routine' where evidence against an individual was classified and therefore could not be submitted to the CCCI.¹⁵⁷ If referred for prosecution, such cases would have been sent before the CCCI-K, and possibly resulted in acquittal.

The CRRB process was said by participants to be intended to meet review requirements under Article 78, Geneva IV.¹⁵⁸ However, Human Rights Watch objected to the application of Geneva IV, arguing that since there was no international armed conflict, the proper law was human rights law, specifically the ICCPR which requires that persons 'arrested' must receive judicial review and a fair trial.¹⁵⁹ Human Rights Watch also demanded Iraqi criminal jurisdiction in place of MNF-I administrative internment.¹⁶⁰

The major criticism of administrative detention arises from those who argue that judicial disposition of a matter should be final, such determinations should be made by Iraqi courts and that all detainees should be transferred to local custody,¹⁶¹ consistently with a Security-Council interest in the domestic rule of law. However, a dismissed criminal file or CCCI-K acquittal did not necessarily result in release but was usually reviewed by the Combined Review and Release Board (CRRB) for possible continuation of detention for security reasons.¹⁶² The independent, nine-member CRRB was a partnership between MNF-I and Iraqi authorities, including six Iraqi ministerial representatives and three senior multinational forces officers.¹⁶³

¹⁵⁶ Annexstad, above n91, at 76, citing *CPA Memorandum 3*.

¹⁵⁷ Annexstad, *ibid*, at 80.

¹⁵⁸ *Ibid*, at 79.

¹⁵⁹ Article 14, ICCPR; Human Rights Watch appears to argue that this applies to all persons detained in Iraq, 2008, above n103, p14.

¹⁶⁰ *Ibid*, p2.

¹⁶¹ For example, *ibid*, p2. Of course, Human Rights Watch made an exception for transfer of detainees where there would be a risk of torture or coercion: p6.

¹⁶² Annexstad, above n91, at 77.

¹⁶³ Two representatives each were from the Ministries of Justice, Interior, and Human Rights, those involved in criminal justice: Annexstad, *ibid*, at 79. One press report, dated 17 December 2006, cited "military officials" saying that "approximately 60 times, or in about 4% of dismissed cases," the

Cases were presented by MNF-I military lawyers and classified evidence could be adduced; deliberations were short as the caseload reportedly reached 1000 per week and matters were decided by majority vote. If release from administrative detention was ordered, MNF-I was given the “opportunity to object.”¹⁶⁴ This practice was apparently conducted with Iraqi consent.

What administrative detention for security purposes demonstrates is a divergence between rule of law rhetoric and academic debate on the one hand and practice on the other. In Iraq, a Security Council intervention under national command but with host state consent, the most permissive of circumstances where one would expect reliance on the indigenous system, administrative detention was authorised and practised to foster security alongside measures aimed at improving the rule of law, which were ultimately unsuccessful because of the lack of security. This has important ramifications for the reliance on security arguments for non-consensual intervention in domestic judicial systems under Security Council authority.

4.3.6 Multinational Involvement in Consent-Based ‘Rule of Law’ Interventions

The involvement of a variety of nations in LAOTF decries the concern that differences between intervening partners can affect a consensus approach to the intervention,¹⁶⁵ notwithstanding differing approaches to, for example, capital punishment, however the point stands for the difference between the legal system of the interveners and the intervened. The criticisms leveled by common lawyers during the occupation period against the inquisitorial character of Iraqi criminal justice were repeated during the period of Security Council authorisation to MNF-I.¹⁶⁶ However, the ubiquity of rule of law rhetoric, often in circumstances where order or security is meant, has the disadvantage of creating a public demand for a “rule of law in

detainee was retained in administrative detention: Moss, above n104. The same officials said that the process had a dual purpose: “striving to protect American troops, while promoting due process.”

¹⁶⁴Annexstad, *ibid.*

¹⁶⁵Newton, above n1, p235. He argues that the shared “pursuit of justice” can create a multi-national force, as well as unravel one, perhaps as a result of his view that the pursuit of justice is one that “seeks to build ... fair, independent and relatively expeditious” courts (at 231). This is the “heart” of the concept of a rule of law society (at 241).

¹⁶⁶Annexstad, above n91, at 73-4, who considers that the nature of the inquisitorial systems means a judge is “more likely to act upon his biases” than a common law counterpart (at 73).

practice” which the society is not in a position to create,¹⁶⁷ either as an international rule of law or the proper formation of a domestic relationship.

Indications from the Iraqi government of intentions to adopt the CCCI model outside Baghdad, although it is not clear whether on a federal or regional jurisdictional basis, suggest the early formation of a new Iraqi rule of law structure notwithstanding the on-going criticisms.¹⁶⁸ It is significant that the spread of the CCCI model has followed a gradual improvement in the security situation in Iraq, albeit not its complete resolution. It supports the view that institutional rights-based rule of law does not lead to security and peace;¹⁶⁹ indeed the lack of security fundamentally handicaps efforts to engage in rule of law reform. Recognising this, the Security Council provision to MNF-I of complete authority to engage in security measures, including administrative detention contrary to the international model of the rule of law as adjudicative criminal justice, is the most practical and pragmatic program for reform.¹⁷⁰ It is also significant, as it was for the Coalition as an occupant, that the MNF-I was exempt from the application of Iraqi law. Although “an unsatisfactory legal gap” in the ideal administration of justice,¹⁷¹ it is acceptable if intervention is understood in security and not international rule of law terms.

¹⁶⁷Newton, above n1, at 247.

¹⁶⁸On 7 October 2008, the High Judicial Council informed Human Rights Watch that CCCI panels had been formed in these districts. A CCCI-R judge (name withheld) reported to Human Rights Watch in May that they would be formed in Mosul, Tikrit and Kirkuk, but would be called “Major Crimes Courts.” Human Rights Watch, 2008, above n103, p11.

¹⁶⁹Compare Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006, p3, who argue that “durable solutions to humanitarian and security problems ... require rebuilding (or building from scratch) the rule of law” through rights-based institutionalism and substantive legal reform, although they are correct in their reference to the need for a “widely shared commitment” as an element of the rule of law.

¹⁷⁰How to measure performance in security intervention is debatable. Jones et al recommend the measurement of outcomes rather than outputs in assessing the success of security reforms which “should encourage experimentation by local managers” to improve performance further: Seth Jones, Jeremy Wilson, Andrew Rathmell, and K. Jack Riley, *Establishing Law and Order After Conflict*, Rand Corporation, Santa Monica, 2005, p.xxi.

¹⁷¹Stahn, above n67, at 317; see also Newton, above n1, at 256, who acknowledges the impact of financial constraints in causing such gaps.

4.4 Security Council Authorisations under National Command without Host State Consent

Where there is no host state consent, the state/s in command of the intervention remain bound by their own obligations under international humanitarian law in armed conflict situations as above. However, where there is no traditional armed conflict between organised forces that would otherwise require application of international humanitarian law, Geneva IV “may offer appropriate and practical answers.”¹⁷² The benefit of this view is the certainty (a claimed rule of law advantage) about the purposive limits of judicial intervention, where an intervener has effective control of some portion of territory.

4.5 Security Council Authorisations under UN Command for Interventions Less Than Assumption of Transitional Administration

There is a divergence of view as to whether the Geneva Conventions, or indeed international humanitarian law generally, apply to interventions which are under direct UN control. Where force for mission accomplishment is contemplated – war-like peace enforcement with or without host state consent under Chapter VII of the Charter, comparable to armed conflict – the UN Legal Office considered that international humanitarian law applies.¹⁷³ Further, the Secretary-General has declared that an inexhaustive list of the core protections of international humanitarian law apply to UN operations, without displacing the national obligations of participating troops.¹⁷⁴

¹⁷²Pfanner, above n78, p56.

¹⁷³Chapter VII peace enforcement was by consent in Korea in 1951, but without it in the First Gulf War. However, problems arise as in Somalia where the character of the operation passes through different stages as in Somalia (compare UNOSOM I under UNSC Resolution 751 (1992); UNITAF under UNSC Resolution 794 (1992) and UNOSOM II under UNSC Resolution 814 (1993)). It is complicated again when the Security Council mandate is for a ‘hybrid operations,’ such as UNPROFOR in Bosnia-Herzegovina (compare UNSC Resolutions 770 (1992), 816 (1993), 824 (1993) and 836 (1993)): Shraga and Zacklin, above n77, p41, and Pfanner, above n78, p57, but compare the Report of Working Group 4 in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994, p89, who did not want to set threshold tests as to classes of operations.

¹⁷⁴*Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13, dated 6 August 1999 and entered into force 12 August 1999.

The Office was more doubtful about its application to peace-keeping operations, where force is authorised only in self-defence, because of the lack of apposite analogy to armed conflict.¹⁷⁵ Further, since they were acting “on behalf of the international community at large,” the UN could not sensibly be construed as being a party or a Geneva Convention ‘Power;’ as an international organisation the UN had not the capacity to fulfill obligations under the Geneva Conventions, notwithstanding the willingness of the ICRC to accept compliance to the extent consistent with its nature.¹⁷⁶ Finally, the UN observed that the Geneva Conventions do not provide for the accession of international organisations,¹⁷⁷ although this does not resolve the question of the applicability of customary law. In any case, UN forces were directed “to observe the principles and spirit” of international humanitarian law.¹⁷⁸

The ICRC view is that international humanitarian law binds all states and all armed forces in a conflict, therefore also “the universal organisation established by States and recognised by them as an independent subject of international law.” However, application would have to be “mutatis-mutandis” given the character of the United Nations, for example regarding certain obligations in the treatment of prisoners of war and penal sanctions.¹⁷⁹ Further, the UN is bound by customary law as it reflects the Geneva Conventions.¹⁸⁰

For rule of law operations, the debate about the formal applicability of humanitarian law is misfocussed. To date, it primarily considered whether its protections are available to UN and associated personnel and whether UN operations are obliged to operate within the tactical limitations imposed by humanitarian law.¹⁸¹

¹⁷⁵Shraga and Zacklin, above n77.

¹⁷⁶For example, in Korea. Shraga and Zacklin, *ibid*, p39, 43; Kelly, above n13, para 454.

¹⁷⁷Shraga and Zacklin, *ibid*, p43.

¹⁷⁸This was explicit for the first time in Article 7 of the Status of Forces Agreement between the UN and Rwanda, and also reflects paragraph 28 of the *Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations*, UN Doc.A/46/185, Annex, see Shraga and Zacklin, *ibid*, p45.

¹⁷⁹Shraga and Zacklin, *ibid*, p42; and see the Statement of the ICRC at the 47th Session of the General Assembly on 13 November 1992.

¹⁸⁰Pfanner, above n78, p58. Further, Article 1(3) of the *UN Charter*, protecting of human rights, “implies respect” for international humanitarian law.

¹⁸¹For example, the *Convention on the Safety of United Nations and Associated Personnel*, 9 December 1994, New York, 2051 UNTS 363, entered into force 15 January 1999, focused on concerns about the protection of personnel conducting UN operations. Article 2(2) excluded Chapter VII “peace enforcement” operations where UN personnel “are engaged as combatants against organised armed forces and to which the law of international armed conflict applies.” Article 20(a)

However efforts to reconstruct judiciaries under international humanitarian law rely on the permissive regimes, subject to purposive limitation, of occupation – that is, a capacity to act, not a protection from others’ actions or a direct limitation on conduct where it is not specifically authorised in the Resolution.

Kelly is the lead proponent of the application of permissive occupation law to UN interventions in control of territory, based on Somali experience, and does not see the presence or absence of armed resistance to the occupation as determinative; more important is the idea of occupation law as the minimum customary standard required in war, therefore no less can be expected in intervention in circumstances less than war.¹⁸² What is missing from his analysis is the character of Security Council authority as a ‘*lex societatis*’ binding on members through the Charter, in which interference in the domestic affairs of a state is explicitly rejected. Since facilitating self-determination in the formation of a state is a principle erga omnes, the argument that where a state has collapsed the limitation does not apply because there is no sovereignty to offend must be rejected.¹⁸³ Even were occupation law to apply, it would not grant a capacity to interfere permanently in such affairs, because the occupant is not the locus of sovereignty.

Further, both when the Security Council exercises its coercive Chapter VII powers or acts with the host state’s consent, it is creating de jure administrative authority, therefore the limits that apply must be the actual limits of the grant. If a UN force is exercising effective control without Security Council authority, then it has unlawfully exceeded its mandate. Where the Security Council does not grant the level of administrative power granted to an occupant as the de facto administrator of the territory, then notwithstanding that the UN force has been tasked to create order it lacks the ‘effective control’ over territory required for an occupant. Therefore, where

also directed UN personnel to “respect” international humanitarian law and human rights standards as they applied to the operation. In fact, the Convention defines the status of UN personnel under *ius ad bellum* but not *ius in bello* (where international humanitarian law dominates): see Antoine Bouvier, ‘Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis’ (1995) 309 *Intl Rev of the Red Cross* 638.

¹⁸²Major M.J. Kelly, ‘Legal Regimes and Law Enforcement in Peace Operations’ in Hugh Smith (Ed), *The Force of Law: International Law and the Land Commander*, Australian Defence Studies Centre (ADFA), Canberra, 1994 (p189), pp190-1. Ottolenghi’s view that occupation law cannot apply to interventions in non-international armed conflicts is not consistent with the view of the UN that its intervention in a non-international armed conflict in a peace enforcement capacity renders it an international armed conflict: Michael Ottolenghi, ‘The Stars and Stripes in al-Fardos Square: The Implications for the Law of Belligerent Occupation’ (2004) 72 *Fordham LR* 2177, at 2182.

¹⁸³Compare Kelly, ‘Legal Regimes,’ *ibid*, p196.

there is consent from the host state to intervention, and the intervention is authorised by the Security Council, the terms of the consent and the Security Council Resolution will govern the extent to which the intervening UN force may engage in judicial reconstruction. This must be so notwithstanding the difficulty of obtaining or maintaining consent, and particularly genuine consent in circumstances where pressure is applied to states to accept intervention.¹⁸⁴ It has been plausibly suggested that the presence of consent poses a problem for the application of international humanitarian law because it could well be indicative of the *absence* of an “armed conflict,” in which case it would not apply, compared to non-consensual peace enforcement operations.¹⁸⁵

4.5.1 Authority to Use “All Necessary Means” to Restore Security

As a result of the criticality of the mandate, and how the operation proceeds, the applicability of international humanitarian law may vary on a case by case basis.¹⁸⁶ A common form of authority is “all necessary means” to restore security generally or to a purpose. The Unified Task Force (UNITAF), for example, in Somalia had a broad mandate, and employed the Security Council’s Chapter VII authority, to permit “all necessary means” to establish a secure environment for humanitarian aid operations.¹⁸⁷ The authorisation to create security and order dominated the approach of UNITAF’s (US) command. Kelly argues that this was an ‘effective assumption’ of the Geneva IV occupant’s responsibilities, despite explicit disagreement by command.¹⁸⁸ Relying on the UN mandate, the Australian UNITAF contingent in Baidoa undertook a deliberate task of judicial systemic reconstruction, based on the linkage between a strong judicial system and security, commencing with a significant effort to restore security and facilitate community consultation and

¹⁸⁴Pfanner, above n78, p53. He notes that the applicability of consent does not limit the Security Council to Chapter VI action only, although it is important to recognise that Chapter VII action is not consent-dependent.

¹⁸⁵Report of Working Group 1 in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994, p75. A focal point of disagreement was whether UN forces could be a party to armed conflict and whether force members were combatants attracting prisoner of war status. The Group also pointed out that peace enforcement operations “had so far always [been] entrusted to States:” p76.

¹⁸⁶Preliminary discussion (Yves Sandoz) in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994, p68.

¹⁸⁷UNSC Resolution 794 (1992), paragraph 10.

¹⁸⁸Kelly, ‘Legal Regimes,’ above n182, p191.

progressing to mentoring participation in the system itself.¹⁸⁹ Kelly reports success with this process of restoring the court as a locus of community life and dispute resolution in Baidoa.¹⁹⁰

The UNITAF mandate is to be compared with the United Nations Assistance Mission in Iraq (UNAMI), established on 14 August 2003,¹⁹¹ which was limited to advice and promotion of human rights and democratic, constitutional development, at the request of the Interim Government. In judicial reconstruction and court intervention its mandate was only to “promote” human rights, reconciliation and judicial and legal reform “to strengthen the rule of law in Iraq.”¹⁹² This was expanded on 7 August 2007 in UNSC Resolution 1770, again at Iraqi request but only “as circumstances permit,” to “advise, support and assist” the same formulation.¹⁹³ It was primarily exercised through consultation, advice and the facilitation of national fora to discuss rule of law issues, but did not involve direct intervention.¹⁹⁴

4.5.2 *Specific Authority to Assist or Participate in Judicial Measures*

The much more specific mandate for UNOSOM II, the third sequential UN operation in Somalia, authorised “all necessary measures against” perpetrators of

¹⁸⁹See Kelly, *Peace Operations*, above n13, para 807 et seq. The Australian effort included purging the judiciary and making appointments on local advice, convening a domestic Steering Committee to assess constitutional reform and review the Somali *Penal Code* (para 768 et seq), providing security and administrative assistance and providing direct legal advice on cases (paras 834-5).

¹⁹⁰Kelly, *Peace Operations*, *ibid*, para 835.

¹⁹¹UNSC Resolution 1500 (2003), and its mandate post occupation was set out in UNSC Resolution 1546 (2004).

¹⁹²Article 7(b)(iii), UNSC Resolution 1546 (2004). The Resolution affirmed in its preface “the importance of the rule of law, national reconciliation, respect for human rights” and democracy. MNF-I was to provide security for UNAMI. The mandate as expanded in UNSC Resolution 1770 (2007), renewed in UNSC Resolution 1830 (2008), but remained one of advice and ‘promotion’ of rule of law and other humanitarian goals. UNAMI continues at the date of writing under authority of UNSC Resolution 1883 (2009). In all Resolutions, the UN undertook to withdraw at Iraqi request: for example, Article 4, Resolution 1770. UNAMI was not the first UN representative organisation in Iraq. The late Special Representative, Sergio Vieira de Mello, appointed under UNSC Resolution 1483 (2003) to advise on “legal and judicial reform,” was killed in August 2003 in the bombing of UN Headquarters in Baghdad, after which the UN withdrew temporarily from Iraq.

¹⁹³Article 1, UNSC Resolution 1770 (2007), as extended.

¹⁹⁴For example, assistance to the Government of Iraq, especially the Ministry of Human Rights, in meeting reporting obligations under various international treaties, and organisation of training workshops in human rights (*UNAMI Human Rights Report 1 April – 30 June 2007*, <http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf>, viewed 26 April 2008, paras 105-6); advocacy on human rights and detention issues (para 13), and training of governmental and corrections officials (paras 88-91): *UNAMI Human Rights Report 1 July – 31 December 2007*, <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jul%20Dec%202007%20EN.pdf>, viewed 26 April 2008.

armed attacks, including investigation, detention and trial,¹⁹⁵ police assistance to restore “law and order” and ‘assistance’ to Somalis to re-establish “national and regional institutions and civil administration in the entire country.”¹⁹⁶ The explicit authority to detain, without clear authority on detention and judicial processing, has been described as a “breach of all acceptable human rights standards,” which should have been addressed by occupation military tribunals or by efforts at reinvigorating an indigenous justice system.¹⁹⁷ The demand for trial and punishment places it outside analogy with administrative detention for security purposes under Article 78, Geneva IV, but there is no recognition of a need or authority to intervene in the domestic judicial structure to ensure effective achievement of the mandate. Thus, in terms of judicial intervention, UNOSOM II actually engaged only in training,¹⁹⁸ and in releasing detainees who had been in extended pre-trial detention to ease prison overcrowding.¹⁹⁹ It ‘avoided’ establishing temporary military courts, relying instead on neighbourhood structures pending the development of a unitary system.²⁰⁰ At UNOSOM II’s 1995 departure, however, not all regional areas yet had a justice system in place.²⁰¹

4.5.3 *The Link Between Security, the Judicial System and the ‘Rule of Law’*

However, UNSC Resolution 865 stated that “the reestablishment of the Somali police, and judicial and penal systems, is critical for the restoration of security and stability in the country.” The emphasis, as in occupation, is squarely security. This does not necessarily require administrative controls and non-consensual intervention in domestic judicial structures, and might, for example, have been met by the provision of adequate security for extant institutions to reform themselves with advisory assistance. With the exception of the extent of involvement of UNITAF legal officers in individual proceedings, this kind of activity in Baidoa

¹⁹⁵Paragraph 4, UNSC Resolution 814 (1993). The first UN operation in Somalia (UNOSOM I) was authorised in response to a request from Somalia, and was limited to certain security operations to allow the delivery of humanitarian aid: UNSC Resolution 751 (1992), drawing on Chapter VI of the *UN Charter*.

¹⁹⁶Kelly, *Peace Operations*, above n13, para 926.

¹⁹⁷Especially Articles 9-11, *Universal Declaration of Human Rights*, adopted by General Assembly Resolution 217 of 10 December 1948, A/RES/217 A III and Article 9, ICCPR; Kelly, *ibid*, para 765.

¹⁹⁸Kelly, *ibid*, para 926.

¹⁹⁹Kelly, *ibid*, para 936, references omitted.

²⁰⁰Kelly, ‘Legal Regimes,’ above n182, p195.

²⁰¹Kelly, *Peace Operations*, above n13, para 926.

was effective in restoring order.²⁰² The *Report of the Commission of Inquiry into UNOSOM II Pursuant to UNCR 885* found that where the UN “operates in a country that it has thus characterised [as being without a government], it necessarily has to bear responsibility for at least some of the basic state concerns traditionally appertaining to a government and that could invariably raise the spectre of a United Nations trusteeship or neo-colonialism.”²⁰³ However, they need not require an interventionist model as regards the domestic judiciary, maintaining the importance of self-ordering and non-interference in domestic affairs. Further one must not conflate law and order with the rule of law. UNITAF was clearly guided that, while the Security Council was “determined further to restore peace, stability and law and order,” it recognised that only Somalis bore “ultimate responsibility for national reconciliation and the reconstruction of their own country.”²⁰⁴

Intervention not concerned directly with the creation of civil order may yet impact on the rule of law. There have been two recent instances of Security Council intervention to create international tribunals to try those accused of international crimes, drawing on Chapter VII authority. These were the International Criminal Tribunals for Former Yugoslavia and for Rwanda (ICTY; ICTR).²⁰⁵ Rwanda, however, was dissatisfied with the domestic rule of law effect of the ICTR for several reasons, chiefly the foreign location of the tribunal and post-trial detention facilities, and the exclusion of the death penalty (especially considering that it could be and was applied in domestic trials).²⁰⁶ While the authorising Resolution does not itself refer to the rule of law, it was explicitly referred to as a reason for intervention in debate.²⁰⁷ In a non-conflict environment, the rule of law was seconded to political

²⁰²Ganzglass, however, prefers to describe it as “successful ... in restoring the rule of law.” He does so in reliance on the institutionalist, ends-based thinking criticised in Chapter One, above: Martin P. Ganzglass, ‘Afterword: Rebuilding the Rule of Law in the Horn of Africa,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p340), pp342-3.

²⁰³Para 251, quoted in Kelly, *Peace Operations*, above n13, para 938.

²⁰⁴Paragraph 10 and prefatory recitations, UNSC Resolution 794 (1992). See also UNSC Resolution 143 (1960), authorising consent-based intervention in Congo (ONUC) under UN command, to “take necessary steps in consultation” with the Congolese government to maintain order. UN Secretary-General U Thant observed that the “maintenance of law and order, which was one of the main attributes of sovereignty, was principally the responsibility of the Congolese government.” Secretary-General’s Report of 29 June 1964 on ONUC (S/5784), see further United Nations, *The Blue Helmets: A Review of United Nations Peacekeeping*, Department of Public Information, New York, 1985, pp218-20.

²⁰⁵UNSC Resolution 827 (1993) and UNSC Resolution 955 (1994), respectively.

²⁰⁶Othman, above n58, p60.

²⁰⁷See further Othman, *ibid*, p54.

acceptability ahead of the holding of free and fair elections when UNTAG (UN Transition Assistance Group in Namibia) only 'discussed' with South Africa the repeal of discriminatory laws which would affect the elections.²⁰⁸

As a result of its Charter interest in security and order, especially in Chapter VII actions, UN commanded intervening forces with less than complete administrative authority in a territory do not tend to focus on the rule of law, but still engage in a range of judicial reconstruction activities with the purpose of achieving order. In Somalia alone, this spanned simple security, amendment to laws, judicial personnel policy, detention and participation in criminal proceedings. However, importantly, these activities were carried out in fact on a consultation or partnership basis, so that they cannot be described as non-consensual activities where they directly impacted the local administration of justice. Further, they are determined by the limits of the authorising Security Council Resolution. Therefore it appears that the Security Council can mandate assistance to domestic judicial institutions with an eye on the (international) rule of law. However, practice does not yet support mandatory, non-consensual intervention as a security purpose.

4.6 UN Transitional Authorities

The third class of UN interventions involves a similar structure but broader authority than the second. It is the establishment of transitional governing authorities pending the development or re-emergence of a representative local government. Recently, this kind of authority has been exercised by the United Nations Transitional Authority in Cambodia (UNTAC), United Nations Interim Administration Mission in Kosovo (UNMIK) and the UN Transitional Authority in East Timor (UNTAET), chief among a handful of instances.²⁰⁹

²⁰⁸United Nations, *The Blue Helmets*, above n204, pp376-7.

²⁰⁹Peacekeeping missions began to expand with UNTAG in 1989-90 (Namibia), and might include "assisting or exercising civil administrative functions during the transition to independence or democracy." Until 1990 the only peace enforcement operations were, in the absence of the Soviet Union, in Korea (1950) and ONUC in Congo (1961): see further Major J.G. Waddell, 'Legal Aspects of UN Peacekeeping' in Hugh Smith (Ed), *The Force of Law: International Law and the Land Commander*, Australian Defence Studies Centre (ADFA), Canberra, 1994 (p47), p49.

The assumption of governing authority, particularly transitional authority, suggests an immediate analogy with occupation law, and is therefore suggestive of its application. However, an examination of the scope of activity authorised by the Security Council on such missions indicates a much broader assumption of authority to institute permanent ‘rule of law’ measures notwithstanding that the terms of the mandates suffer from a lack of specificity in sweeping grants of competence. This, it has been said, means the authority is deliberately left to “give meaning” to their own mandate to exercise legislative, judicial and executive powers.²¹⁰ In Kosovo, for example, UN forces exercised “all legislative and executive authority ... including the administration of the judiciary,” although they themselves were explicitly excluded from the legal system they sought to create.²¹¹

A similar grant to the UN Transitional Authority in East Timor (UNTAET) in 1999 also overlooked the phrase ‘rule of law,’²¹² but conferred broad and more specific administrative authority to build the foundations for a democratic and stable state, to prepare East Timorese for governance, to facilitate the drafting of a constitution, and to build a legal system, a judiciary, a police force and a civil service; East Timorese involvement was integral, unlike in Kosovo.²¹³ Resolution 1272 was passed in response to a Secretary-General’s report that civil administration in East Timor had collapsed and the courts “had ceased to exist,”²¹⁴ explaining its specificity.

²¹⁰As in Kosovo and East Timor: Stahn, above n67, at 321.

²¹¹Chesterman, above n9, at 349, referring to UNMIK *Regulation 1999/1: On the Authority of the Interim Administration in Kosovo*, entered into force 78 September 1999.

²¹²Para 1, UNSC Resolution 1272 (1999).

²¹³Para 2, *ibid*; Othman, above n58, p48. INTERFET, which preceded UNTAET, was also a Chapter VII authorisation to use “all necessary means to restore peace and security” in East Timor without specific reference to the ‘rule of law.’ UNSC Resolution 1264 (1999). INTERFET, under Australian command, deployed on 20 September 1999 and was authorised to apprehend and detain local citizens as “security” detainees, on suspicion of criminal activity as well as security purposes: COMINTERFET Detention Ordinance, 21 October 1999; see also Othman, above n58, p109 and Bruce Oswald, ‘The Interfet Detainee Management Unit in East Timor’ (2000) 3 *YB of IHL* 347-361. The policy spoke specifically of “apprehension” not “arrest.” Plunkett argues that the combination of “banditry,” the maintenance of “order by lawless means,” and human rights violations prior to UN intervention amounted to a “rule of law vacuum.” Mark Plunkett, ‘Rebuilding the Rule of Law,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p207), p207.

²¹⁴Progress Report of the UN Secretary-General, *Question of East Timor*, A/50/436, 19 September 1995, para.37. See further Othman, above n58, pp48-9, and Suzannah Linton ‘Prosecuting Atrocities at the District Court of Dili’ (2001) 2 *MJIL* 301, but note that a similar near-total lack of a trained judiciary did not justify intervention by a UN transitional authority to restore the ‘rule of law’ in

In practice, both mandates were held by the respective UN transitional authorities to have authorised wide-reaching programs of judicial and legal reform. By comparison with the legal authority of occupants, UN transitional authorities appear to consider themselves authorised to implement permanent and comprehensive institutional change in pursuit of the rule of law, notwithstanding the absence of that term in the authorising resolutions. Further, the rule of law as conceived by UN practitioners falls firmly into the rights-based institutionalist model discussed in Chapter One.²¹⁵

In Kosovo, for example, the Security Council received a report in which the ambit of competence claimed, responding to an “urgent need to build genuine rule of law,” included amendment of domestic laws and institutions where they conflicted with the UNMIK mandate, the issue of regulations as the superior law, appointment and training of judicial officers, the assurance of judicial administration of courts, police and prisons, development of legal policy, and the establishment and re-establishment of permanent courts.²¹⁶ UNTAET considered itself competent to ‘abolish’ the death penalty,²¹⁷ and exercise a similar range of authorities, including the insertion of a new Special Panel for Serious Crimes in the Dili District Court, with a mixed national and international bench,²¹⁸ creation of a “completely new” indigenous judiciary with “no succession” either to the court arrangements under Indonesian occupation or earlier Portuguese colonial administration, administering

Rwanda in 1994. The state of the judiciary there was reported to the UN by Special Representative Mr. Michel Moussalli in *Report on the Situation of Human Rights in Rwanda submitted by the Special Representative*, UN Doc. E/CN.4/1999/33, 8 February 1999, para 39.

²¹⁵For example, the rule of law was urgently to be created “through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary” and would thus contribute to reconciliation and security in the area.” *Report of the Secretary-General on the UN Interim Administration in Kosovo*, 12 July 1999, S/1999/779, para 66. For UNTAC, see De Mello, above n14, p25, and generally see Stahn, above n67, at 333-4.

²¹⁶*Report of the Secretary-General on the UN Interim Administration in Kosovo*, *ibid*, paras 36-40 and 66-71 in the specific context of judicial affairs. The Supreme Court of Kosovo, abolished during Serbian rule in 1991, and the General Prosecutor’s Office were restored and the remainder of the court hierarchy ‘rationalised’ (paras 70-1). UNMIK also established a specific Judicial Affairs Office, which augmented the work of the Organisation for Security and Co-operation in Europe (OSCE), which took key responsibility for “institution building and human rights:” see further Newton, above n1, at 258-9. The Judicial Affairs Office was given specific authority over “the administration of courts, prosecution services and prisons; the development of legal policies; the review and drafting of legislation, as necessary, for the goals and purposes of UNMIK; and the assessment of the quality of justice in Kosovo, including training requirements:” *Report of the Secretary-General on the UN Interim Administration in Kosovo*, *ibid*, para 67.

²¹⁷Section 3.3, *UNTAET Regulation 1/1999: On the Authority of the Transitional Administration in East Timor*, entered into force 27 November 1999. Compare the ‘suspension’ of capital punishment during the Coalition occupation of Iraq in section 3.5.1, Chapter Three above.

²¹⁸See Othman, above n58, p96, who describes it as a “distinctive” feature of UNTAET.

the Public Prosecution Service through the Department of Ordinary Crimes, introducing a new role of Investigative Judge which had not existed under the Indonesian-administered court system where investigation was the responsibility of the Prosecutor,²¹⁹ planning employment of international judges and prosecutors directly in extraordinary courts,²²⁰ establishing a salaried 'Public Defender System',²²¹ and establishing the Reception, Truth and Reconciliation Commission.²²² Both authorities were explicitly interested in the rule of law.

UNTAC poses a contrast. It had a notionally more limited grant of legislative competence, although its human rights mandate has been described as "the most comprehensive human rights mandate ever entrusted to a United Nations peace-keeping force" to achieve systemic change and to facilitate free elections through training and investigation of abuses.²²³ UNTAC had "direct control" over five areas: defence, public security, finance, foreign affairs and information,²²⁴ but law and order, and the administration of justice, was left to domestic factions.²²⁵ This meant UNTAC's non-rights related intervention was limited to advice on legal and judicial reform,²²⁶ the kind contemplated by interveners with less than complete administrative authority.

Its rights mandate with respect to preventing the reoccurrence of past abuses, on the other hand, supported a significant interest in transitional justice. In the

²¹⁹The new structure comprised District Courts and the Court of Appeal, although at the time of Othman's publication four District Courts had been established across thirteen administrative districts: *ibid*, p95. See sections 4 and 7, *UNTAET Regulation 125/2001: On the Amendment of UNTAET Regulation 11/2000 on the Organization of Courts in East Timor and UNTAET Regulation 30/2000 on the Transitional Rules of Criminal Procedure*, entered into force 25 September 2000, and also *UNTAET Regulation 18/2001: On the Amendment of UNTAET Regulation No. 2000/11 on the Organization of the Courts in East Timor*, entered into force 6 March 2000, and *16/2000: Organisation of the Public Prosecution Service in East Timor*, entered into force 6 June 2000. Compare the role of the Investigative Judge in the Iraqi criminal court structure, as described in Adnan Abdelazak al-Hashemi, 'Criminal Trial Procedures as a Tool to Serve Litigants, Protect Human Rights, and Activate the Judicial Activity,' *Iraqi Judicial Forum: Iraqi Judicial System: Reality and Prospects*, Baghdad, 2004, and Annexstad, above n91, at 73-5.

²²⁰However, the planned Kosovo War and Ethnic Crimes Court (KWECC) never sat due to concerns about the diversion of resources from the domestic judiciary and the fear of inflaming ethnic tensions: Stahn, above n67, at 331-2 and Newton, above n1, at 259.

²²¹Othman, above n58, p97.

²²²*UNTAET Regulation 10/2001: On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, entered into force 13 July 2001; Stahn, above n67, at 335-6.

²²³De Mello, above n14, p26.

²²⁴*Ibid*, p27.

²²⁵Janet Heininger, *Peacekeeping in Transition: The United Nations in Cambodia*, Twentieth Century Fund Press, New York, 1994, p98.

²²⁶*Ibid*, p99.

absence of a “credible judicial system” after the personnel shortages left by Khmer Rouge purges and the political inability to prosecute the Khmer Rouge itself for crimes against humanity, UNTAC established a Special Prosecutor’s Office on 6 Jan 1993, “to prosecute cases in the Cambodian court system itself rather than rely on the authorities to do so.”²²⁷

Rule of law rhetoric has placed judicial reconstruction high in UN transitional authority prioritising. Special offices dedicated to judicial reconstruction programs have been established in Cambodia, Kosovo and East Timor. However, there is typically a strong dual focus in the course of interventions: in reconstructing or recreating the domestic judicial system for the ordinary administration of justice, and in developing ‘transitional justice’ programs, to prosecute allegations of international and other crimes committed in the course of the regime replaced by the UN transitional authority. In East Timor, transitional justice was linked directly to the rule of law; accountability was notable because it was to be complete, as against all perpetrators, and because it was “premised on a workable cooperative arrangement” with Indonesia.²²⁸ However, where transitional justice is primarily left to the subject community, complete legal accountability is not necessarily sought.²²⁹

Finally, as in occupation law, transitional authorities assert competence to declare the nature of the applicable law. In both Kosovo and East Timor, the declaration was met with dispute by significant groupings in the community. In Kosovo the applicable law was proclaimed to be that extant in 1989, prior to the Serbian seizure of control, but, oddly, UNMIK allowed application of post-1989 laws “as an exception” provided they did not compromise human rights and

²²⁷Some UN prosecutors, however, reported the discontinuing of proceedings and political pressure not to affect the electoral process: *ibid*, p97.

²²⁸Othman, above n58, p33, see also the *Memorandum of Understanding (MOU) regarding Cooperation in Legal, Judicial and Human Rights Related Fields* as signed between UNTAET and Indonesia on 6 April 2000, published in the Official Gazette of East Timor, vol 1/3, pp93-96. Othman, who served as a UN prosecutor, explained full accountability as a result of public pressure, the “domestic nature” of the accountability model and the “need to establish the rule of law and to create a viable system of administration of justice,” *inter alia*. He also notes cooperative accountability as the Security Council’s preference in Resolutions 1272 (1999), 1319 (2000) and 1410 (2002), and a necessary result of the primacy of complementary jurisdiction before the International Criminal Court: see p129.

²²⁹For example in Rwanda, the *Organic Law on Genocide 1996* provided that accountability should target those with leadership and therefore the greatest responsibility. See further Othman, above n58, pp164, 172.

addressed what would otherwise be a lacuna.²³⁰ In East Timor, the applicable law was declared to be that extant prior to the commencement of UNTAET, but subject to similar caveats about human rights standards and mandate conflicts.²³¹ However, this was subject to divergent, and trenchant, interpretation by the Court of Appeal as reconstituted by UNTAET,²³² to the extent that Othman saw the only solution to the retardation of “the administration of justice” as legislative intervention, notwithstanding its breach of the separation of powers.²³³ Further, caveating the continued application of laws with international human rights standards has been argued to be “too simplistic” in its demand that laws be interpreted to the most current rights standards, without the necessary background in the domestic legal system.

Specific legal concerns arise in the direct application of international standards to fill gaps in the UN regulatory regime, which would normally be subject to the domestic constitutional position on the incorporation of international law.²³⁴ Both issues pose substantial problems, and inhibitions, for the development of a genuine domestic rule of law relationship post-intervention. What they clearly achieve is preparation of sufficient institutional forms for the putative State to participate in the international rule of law.

Practical criticisms of judicial intervention are remarkably consistent across transitional authorities. Key among them is lack of sufficient funding to introduce and maintain the institutional and personnel changes attempted in the course of the administration, and also the lack of intervention in some areas due to funds limitations, leading to ineffective defence and shortcomings in judicial decision-

²³⁰Article 1, *UNMIK Regulation 24/1999: On the Law Applicable in Kosovo*, entered into force 10 June 1999.

²³¹Section 3, *UNTAET Regulation 1/1999*.

²³²The majority of Portuguese judges interpreted Section 3.1 of *UNTAET Regulation 1/1999* as providing that the law applicable before 25 October 1999 was Portuguese law and not Indonesian law, since Indonesia had never been a lawful occupant: *P v Armando do Santos*, p4, Court of Appeal, Case No: 16/PID.C.G./2001/PD.DL, 15 July 2003. The Special Panel for Serious Crimes, in *P v J. Sermento D. Mendonca* decided not to follow that decision on the ground that the Court of Appeal had violated the Constitution, the laws of East Timor, and international human rights standards: SPSC, Dili District Court, Case no: 18a/2001, 24 July 2003. Othman recounts the effect of subsequent contradictory decisions and the resulting application of different bodies of law by different courts within the same hierarchy, above n58, p91.

²³³Othman, *ibid*.

²³⁴Stahn, above n67, at 322, references omitted. Compare section 3, *UNTAET Regulation 1/1999* which, in addition to a general caveat, identified certain laws which breached rights standards and declared that they “shall no longer be applied.”

making.²³⁵ This was particularly so for UNTAC, although it overlooks the effect of significant limitations in its mandate.²³⁶ These criticisms seem to focus on the lack of success in rule of law creation through too-minimal intervention, rather than criticising the character of judicial intervention itself.

However, reflective of the rule of law properly so called, interveners' lack of familiarity with the domestic legal system, including basic shortfalls in the availability of the applicable law in translation or generally,²³⁷ and in the rejection of reconstruction measures by parts of the subject community²³⁸ have impacted on UN-administered judicial reconstruction. By contrast, where reconstruction measures such as the East Timorese Special Panel for Serious Crimes drew on the extant legal framework rather than directly from international documents, and indigenous personnel, this was seen as an advantage to the smooth administration of justice.²³⁹

Like occupation, the strongest critiques are based on the character of intervention and the compatibility of the authority granted to transitional authorities with the rule of law properly so called. A fundamental problem with intervention in the judiciary to produce judicial independence, through de-politicising lustration, training or the provision of advice generally and in specific matters, is that such intervention requires necessarily close supervision of the judiciary, contrary to the human rights-based obligation to respect the independence of the judiciary.²⁴⁰ The same argument applies to the capacity granted to transitional authorities, as to

²³⁵For the uneven allocation of resources to defence counsel services, compared to prosecutions, in East Timor, and the lack of funding for transcription and court recording, see Othman, above n58, p103-4. Section 26, *UNTAET Regulation 11/2000: On the Organization of Courts in East Timor*, entered into force 6 March 2000, mandates the transcription of proceedings.

²³⁶UNTAC was criticised for not funding judicial salaries as a means to assure judicial independence: Comments on the Asia Watch Report of May 1993, from a letter written by Special Representative Yasushi Akashi, quoted in Heininger, above n225, p97. It also decided it was not feasible to retrain judges legally before its mandate expired: *ibid*.

²³⁷Stahn, above n67, at 329 (UNMIK).

²³⁸The UNMIK-planned Kosovo War and Ethnic Crimes Court (KWECC) never sat because of fears of inflaming ethnic tensions, inter alia, while Serbian judges refused to participate in the emergency judicial review program implemented to review security detainees apprehended by KFOR: Newton, above n1, at 258-9.

²³⁹Othman, above n58, p97.

²⁴⁰Stahn, above n67, at 323-4, and also Hansjorg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46, at 51, 58. For example, *UNMIK Regulation 24/1999* encouraged Kosovar courts to "request clarification from the Special representative of the Secretary-General in connection with the implementation of the present regulation," which identified the body of applicable law in the area: section 2. Further, persons detained by KFOR, a NATO force deployed under UNSC Resolution 1244 (1999), on security grounds were held in protracted detention without trial while the applicable law and suitable judicial fora were established: Newton, above n1, at 247.

occupants, to detain persons administratively for security reasons, without necessary reference to human rights standards, and to their exemption from the application of domestic law which they assert competence to create.²⁴¹

The concern is more than the initial problem of the limited temporal authority of UN Transitional Authorities while attempting to achieve permanent or long-term development, or the too-rapid development of a transitional society leading to “resentment and disbelief in the virtues of liberalism.”²⁴² It is the asserted capacity of UN interveners to introduce purportedly permanent judicial change, substantially more than the competence of the occupant. It is especially so when the effect of the change is irreversible, for example the imposition of criminal convictions or the liberalisation of the economy.²⁴³

In a telling reflection on the (lack of) permanent rule of law effect through UN Transitional Authority intervention, the UNTAET-established judiciary was adopted in the new East Timorese Constitution but only “until such times as the new judicial system is established,” while transitional accountability through the mixed SPSC was maintained pending the resolution of contemporary investigations.²⁴⁴ If the intervention is directed to achieving the rule of law, it cannot succeed without the domestic origination of change.²⁴⁵

4.7 Conclusion: The Concern of Security Council Interventions with Restoring the Rule of Law

Human Rights Watch’s emphasis on the institutionalist model of rule of law as the key to national reconciliation in Iraq²⁴⁶ is challenged by realities not just in that consent-based intervention, but in the range of interventions conducted under the banner of the United Nations. The view of international law that the rule of law is an

²⁴¹Stahn, *ibid.*, at 329.

²⁴²*Ibid.*, at 324-5, 335-6.

²⁴³*Ibid.*, at 326.

²⁴⁴Sections 160 and 163, *Constitution of the Democratic Republic of East Timor 2002*.

²⁴⁵Stahn identifies an “ultra-liberal critique” of intervention “in core areas of state-building, such as democratisation and judicial reconstruction, because domestic actors have the right to make their own mistakes and to learn from them” (above n67, at 326), or the “threat of tutelage,” but the problem is greater. It is not so much that the domestic population is deprived of a self-development opportunity, the very lack of their involvement precludes the rule of law.

²⁴⁶Human Rights Watch, 2008, above n103, p3.

absolute is incompatible with the legal and political demand for intervention under Security Council auspices to create it, both in law and in practice. Even the firmest of rights-based theorists acknowledge that the conduct and legitimacy of the interveners' will affect their effort to persuade locals that "law matters" and that there will be "internal contradictions" in intervention.²⁴⁷ The consequence should be programs tailored to the security situation facing interveners, but international pressure, based on its concept of the rule of law, increasingly demands a standard package or blueprint.²⁴⁸

Recognising the actuality of intervention and its contradictions to the international rule, the continuing push in international law for a single, rights-based global structure has serious implications for the principles of self-ordering and sovereignty in the development of indigenous legal systems and rule of law relationships.

²⁴⁷Stromseth et al, above n169, p21 and 12 respectively. This is particularly so when seeking an independent judiciary which is a product of both law and society: Robert S. Summers, 'A Formal Theory of the Rule of Law' (1993) 6(2) *Ratio Juris* 127, at 134.

²⁴⁸Especially Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, A/55/305 S/2000/809, United Nations, 2000 ("Brahimi Report") which supports the development of a standard criminal code for transplantation into transitional societies, especially to ease problems during the intervention itself caused by the interveners' lack of familiarity with domestic law: paras 80-1; Mark Plunkett, 'The Establishment of the Rule of Law in Post-conflict Peacekeeping' in Hugh Smith (Ed), *International Peacekeeping: Building on the Cambodian Experience*, Australian Defence Studies Centre (ADFA), Canberra, 1994.

CONCLUSION:

MOVING TOWARDS RULE OF LAW LEGITIMACY BY REFOCUSING ON ORDER IN INTERVENTION

Practitioners identify, unsurprisingly, practical aspects such as “funding and physical capability” as essential to the efficacy of rule of law operations,¹ but this presupposes coherence in the idea and purpose of interventions in domestic legal systems with a rule of law purpose at all. Stromseth and her colleagues attribute “disappointing progress” in military ‘rule of law’ interventions to create rights to three factors: the complexity of the mission, the typical “resource and bureaucratic constraints,” but above all “*the failure of many policymakers to examine or fully understand the very concept of ‘the rule of law.’*”²

Identifying the building of the ‘rule of law’ as a mission in international military interventions is beset with contradictions between rule of law theory, legal theory, the content of international law and the reality of security and order. The concerted effort in Iraq both under the law of occupation and later consent-based Security Council authorisation to create ‘the rule of law’ through functioning courts crystallise a growing body of practice which brings into serious question the traditional and widespread view that the restoration of order, as a security function, and of the rule of law proceed hand in hand,³ demonstrating that the best efforts to

¹Michael Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*, Australia Government Publishing Service, Canberra, 1997, para 1039. The Brahimi Report described its “key conditions” as “political support,” which has legitimacy overtones to be explored further below, rapidity of deployment and “a sound peace-building strategy” (para 4), which are still directed to the practicalities of intervention: Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, A/55/305 S/2000/809, United Nations, 2000 (“Brahimi Report”).

²Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006, p69, emphasis original.

³For example, Michael Kelly, ‘The Role of the Military in Globalising the Rule of Law,’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p184), p190, citing the experience of UN Transitional Authority in East Timor (UNTAET) and UN Mission of Support in East Timor (UNMISSET) interveners in Timor Leste and Coalition forces in Iraq in 2003; Stromseth et al, above n2; Mark Plunkett, ‘Rebuilding the Rule of Law,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p207).

create rights-based criminal justice institutions as the core feature of the latter generally fail without an existing basic level of order in society. Prematurely attempting to create domestic institutions matching the international rule of law model in these circumstances, or doing so via imposed measures lacking domestic legitimacy, achieves little but to bring the rule of law itself into disrepute. Indeed, the “1990s notion of the Washington Consensus, namely that democracy, markets and the rule of law all would develop in unison, looks hopelessly naive a decade later.”⁴

5.1 Dismantling the Security / Rule of Law Interrelationship

Popular substantive or blue print theories of the rule of law continue to assert that the rule of law is expressed only in a rights-based criminal justice system based on familiar judicial structures.⁵ In Kosovo and Iraq, for example, programs were introduced contemporaneously to “establish security and build governance structures that advance fundamental goals of self-determination and protection of human rights.”⁶ Similarly, the Brahimi Report’s “key recommendations” for United Nations operations were for interveners to participate in short-term, high visibility local engagements, for example in rebuilding core infrastructure, to address the problem of former combatants, and to develop a “doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments.”⁷ Peacebuilding through the rule of law and democratisation, Brahimi said, is “integral to the success of peacekeeping operations” in resolving conflict.⁸

However, the law of interventions recognises the primary importance of security by allowing activities contrary to the rule of law to restore “public order”

⁴Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008, p2.

⁵For example Stromseth et al, above n2; Rachel Kleinfeld, ‘Competing Definitions of the Rule of Law,’ in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p31); and see section 1.2.3, Chapter One above.

⁶Stromseth et al, above n2, pp51-2.

⁷Brahimi Report, para 47(b), and see also 37 and 41-2.

⁸Brahimi Report, para 35, finding support from the Security Council and the General Assembly’s Special Committee on Peacekeeping Operations.

and the necessary “administration of justice.”⁹ In fact, laws governing the conduct of intervention whether under occupation or authority of the UN Security Council do not themselves regulate rule of law institutionalism at all. At best, occupation laws are a “minimum legal framework for the restoration of law and order ... [but] are quite conservative in their conception of authority and reform.”¹⁰ That is, where the first line of inquiry in this thesis deconstructs the concept of the rule of law as expressed in international discourse, the second line of inquiry demonstrates that the law of interventions in effect supports the concept of the rule of law as an indigenous relationship. They do not explicitly allow permanent intervention in domestic judicial and legal structures for any ‘rule of law’ purpose but only to restore order and security.

Even the broadest form of intervention, Security Council transitional administrations which purport to act on behalf of the subject people to implement such permanent changes, remains unable to foster the rule of law as a legitimate domestic system. It is interesting to note, as Stahn does, that transitional administrations which do pursue the rule of law as a mission approach the problem and solutions as society-based, rather than the focus on individual rights through victim-centred interests in transitional justice which might be expected from the overwhelming role of human rights in rule of law theory.¹¹ It suggests a fundamental recognition of the greatest efficacy of individual rights in an orderly society. The principle of derogability in human rights law, including of the right to a fair trial in times of national emergency including armed conflict as well as internal disorder,¹² demonstrates the same result.

Putting aside the international legitimacy and support thought to flow from appeals to the rule of law as mission goals, the applicable law takes a more pragmatic view, delinking security, sometimes formulated as *order*, from rule of law

⁹Article 43, *Annexe to Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land*, 18 October 1907, The Hague, (1908) 2 AJIL Supplement 90-117, entered into force 26 January 1910; Article 64, *Convention IV Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Geneva, 75 UNTS 287, entered into force 21 October 1950, respectively.

¹⁰Carsten Stahn, ‘Justice under Transitional Administration: Contours and Critique of a Paradigm’ (2005) 27 *Hous J Intl Law* 311, at 319.

¹¹*Ibid*, at 315.

¹²For example, Articles 4 and 14, *International Covenant on Civil and Political Rights*, adopted by General Assembly Resolution 2200 (1966), A/RES/2200A XXI, 999 UNTS 171, entered into force 23 March 1976 (“ICCPR”); section 1.3, Chapter One above.

development internal to the subject population. Intervention practice, amongst which the experiment of the Central Criminal Court of Iraq stands out, shows that without a pre-existing level of order achieved through extraordinary means permitted by intervention law, adjustments to 'rule of law institutions' produce no more than negligible results.

"Like democracy, the rule of law requires the right conditions to flourish,"¹³ and the necessary conditions are order and security. Forces deployed in Bosnia concluded, as their "pre-eminent lesson," that their role was to create "an environment that is conducive to the rule of law," including by combating power structures obstructing the development of rule of law institutions.¹⁴ The Brahimi Report agreed that force "can only create the space in which peace may be built,"¹⁵ although it advocated rule of law intervention. The Report, and other writers, intuitively recognise this, but, by equating 'law and order' with the 'rule of law,'¹⁶ conceptual clarity is lost. Recognising the delineation between security and the rule of law is essential in defining the future of intervention. Adopting suitable terminology and labels is a part of this process, whether 'security operations' or other.¹⁷

Once the rule of law is reconceptualised not as a universal system of rights-based institutionalism, but as a negotiated internal relationship between the subjects of the law, the failure of domestic legitimacy in rule of law operations is explicable. Legitimacy comes through self-ordering; it requires more than locals 'internalising'

¹³Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, Palgrave, New York, 2001, p176.

¹⁴*SFOR Lessons Learned: in creating a secure environment with respect for the rule of law based on a study of Bosnia*, unpublished report provided to Kelly by US Armed Forces (May 2000), cited in Kelly, 'Role of the Military,' above n3, at p192.

¹⁵Brahimi Report, p.viii.

¹⁶For example, US Presidential Decision Directive 71 (PDD71), *Strengthening Criminal Justice Systems in Support of Peace Operations and Other Complex Emergencies* "concluded that the issue of re-establishing the rule of law is of the highest priority in a peace operation and will result in the earliest opportunity for the ramping down of military involvement," but that "unless basic safety is provided, the civilian organisations will be unable to conduct their tasks:" Kelly, 'Role of the Military,' above n3, p193, noting that PDD71 was "shelved" by the GW Bush administration (p194); Plunkett, above n3.

¹⁷This must be matched by definition, however. Australian doctrine labels brings rule of law tasks, including "supplementary law enforcement" by military police, under the aegis of "security operations," but makes no distinction between the two missions: Combined Arms Training and Doctrine Centre, *Land Warfare Doctrine 1: The Fundamentals of Land Warfare*, Cth of Australia 1998, which designates 'rule of law' operations as 'security operations:' see Kelly, 'Role of the Military,' above n3, p197.

or ‘buying into’ external reforms.¹⁸ Military intervention to restore order and security creates the preconditions for the formation of a rule of law relationship – but not the result.

5.2 International Legitimacy and ‘Rule of Law Operations:’ Explaining Persistence despite Failure

Sovereignty, and in particular, the sovereign equality of states, has traditionally been considered the underpinning “architectonic” concept of international law, supporting the principles of their relationships, including self-determination, jurisdiction over population and territory, the capacity to engage in diplomacy and treaty relations, non-intervention, and, indeed, the ban against force itself.¹⁹ The equality of states is the foundation of a Nardinian international rule of law relationship, although the practice of equality through the Security Council has been criticised.²⁰

Since 1945, however, democratic sanction and rights protection are increasingly seen as a sign of “legitimacy” on the part of states, drawing primarily on rights documents such as the Universal Declaration.²¹ The Brahimi Report’s focus on democracy building, and “free and fair elections” in strengthening governance, relies on it being viewed as an “appropriate and credible” alternative to violence as a means of expression. However this requires “the support of a broader process of democratisation and civil society building that includes effective civilian governance and a culture of respect for basic human rights, lest elections merely ratify a tyranny of the majority or be overturned by force” later.²²

¹⁸Plunkett is concerned with local ‘ownership’ through participation in reform: above n3, p223. Stahn recommends “moderation” in intervention to maximise the chance of internalisation: above n10, at 343. Measures to achieve this focus on matters such the promulgation of new codes in local languages: for example, SJA After Action Report, Tab A(1), quoted in Kelly, *Peace Operations*, above n1, para 764.

¹⁹Glennon, above n13, pp147-8.

²⁰Terry Nardin, ‘Theorising the International Rule of Law’ (2008) 34 *Rev of Intl Studies* 385; section 1.5, Chapter One above.

²¹Spencer Zifcak, ‘Globalising the Rule of Law: Rethinking Values and Reforming Institutions’ in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p32), p36.

²²Brahimi Report, para 38.

The Brahimi Report demonstrates that legitimacy is a substantive rather than a formal concept, but assumes easily that the UN mission ought therefore be to promote democratisation, especially given the membership of non-democratic states in the UN. Sovereignty, it appears, permits that discretion as to domestic organisation. An apparent tension follows between the preservation of domestic jurisdiction from intervention under Article 2(7) of the Charter, and the desire to promote democracy “as distinct from implementing the international law of human rights which did not necessarily presuppose a democratic political order.”²³

In the late twentieth century, cases of ‘humanitarian intervention,’ particularly in Kosovo but also in Iraq, indicate that “a growing number of state no longer assert that sovereignty can shield everything done within their borders, however heinous.”²⁴ It followed a notable hiatus in United Nations-authorized rule of law interventions in the course of the Cold War, which has been attributed to both “strategic and normative factors.”²⁵ Since the fall of the Berlin Wall, however, human rights as the foundation of the rule of law, and thus legitimacy, have emerged as the greatest challenge to sovereignty, leading to interventions to restore or create the domestic rule of law in independent sovereign states.²⁶

Part of the problem is dispute about the content of ‘sovereignty’ as a foundational concept of the international legal system. Roberts considered there to be “no unambiguously clear definition,” although there is a core meaning of territorial decision-making authority “not subject to a higher sovereign.”²⁷ It is “independence” within that territory.²⁸ Roberts, however, questions the extent to which there ever was any complete freedom from external constraint, and prefers a formulation of “prime responsibility,” in face of international standards institutions and controls, although he acknowledges the still “powerful” attraction the concept of sovereignty holds in

²³Preliminary Discussion in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994, pp35-6.

²⁴Glennon, above n13, p161. Tomuschat, describing a “process of progressive erosion,” as part of a “development of greater community discipline” and a renegotiation of “the right balance” between the interests of states and of humanity: Christian Tomuschat, Lecture at Hague Academy of International Law, 1993, quoted in Adam Roberts, ‘End of Occupation’ (2005) 54 *ICLQ* 27, at 40.

²⁵Stromseth et al, above n2, p29.

²⁶Ibid.

²⁷Roberts, above n24, at 39.

²⁸*Island of Palmas Arbitration* (1928) 22 *AJIL* 867 at 875, per Judge Huber. Roberts notes that although the UN Charter refers to sovereign equality in Article 2(1), it is not defined: Roberts, *ibid*, at 39.

post-1945 international relations.²⁹ These standards form the agreed basis of the international rule of law relationship, but they cannot be accepted as internationally legitimate (socially acceptable), if it remains acceptable through the doctrine of sovereignty for states not to express the same view domestically.

Domestic realignment, possibly by coercion (through ‘humanitarian intervention’), must occur if the international rule of law is to remain coherent and legitimate itself. As the chief organisation for the international community, the UN has taken a lead role in managing this problem of coherence, notwithstanding its original structure and charter to regulate “the relationships *between* or *among* but not *within* states” a result which requires a reinterpretation of traditional sovereignty.³⁰ Where a regime is not seen to draw legitimacy from subjective domestic features such as democracy or the rule of law, consistent with the international rule of law, it is not possessed of ‘sovereignty’ warranting freedom from external intervention.

Sovereignty is thus an expression of, or benefit of, international legitimacy. Implementing within a state a legal system characterised by legality, accountability, equality, and a commitment to fundamental human rights,³¹ endows it with international rule of law legitimacy. Internationally, that is thought also to confer domestic legitimacy through democratisation.³² Equally as importantly, the appeal to a rule of law mission in interventions attracts legitimacy to the interference in sovereignty. In both Kosovo and Iraq, for example, unilateral interveners subsequently sought Security Council support for aims including democratisation and the rule of law, to garner greater global support.³³ The politicising of humanitarian intervention by papering over other missions or outcomes with rule of law rhetoric has attracted criticism in different forms from the International Committee of the Red Cross³⁴ and the Brahimi Report, which preferred no

²⁹Roberts, *ibid*, at 40-1. Thus, for example, the Iraq Interim Government, to which “sovereignty” was transferred on 28 June 2004 at the end of occupation was not absolutely independent, but may yet have been sovereign: at 41.

³⁰Kelly, *Peace Operations*, above n1, para 112.

³¹Zifcak, above n21, p36. Zifcak takes the current institutionalist view of the rule of law, requiring features such as a constitution, judicial review, inter-party dispute resolution (with a broader focus than simply criminal justice) and enforceability of decisions, all informed by fundamental human rights: pp38-9.

³²For example, Brahimi Report, paras 13-14.

³³Stromseth, above n2, pp51-2.

³⁴Jean de Courten (ICRC) criticised the subordination of purely humanitarian objectives to political ends in 1990s UN operations and in *An Agenda for Peace, Preventative Diplomacy, Peacemaking and*

intervention where Security Council consensus-building resulted in ambiguous mandates and outcomes in dangerous situations.³⁵

What, however, is meant by legitimacy, and how is it measured? Rather than involve some element of objective rightfulness, empirical approaches regard it simply as a function of social acceptability. Blueprint and substantive theorists are unable to measure this aspect of rule of law intervention, because they assume universality of forms (and thus that the existence of forms reflects the rule of law, notwithstanding the relationship of the population to those institutions and the flow-on effects for order, security and efficacy), and, equally or more importantly, they are unable to measure accurately what they seek to change through intervention.³⁶

For those who do identify performance indicators, the measures are simple ones. José Juan Toharia, for example, proposes that the best means to evaluate justice systems is the conduct of “public opinion polls,” and that such a survey not only tests the system’s legitimacy but actually reinforces the rule of law. He concludes that “technical efficiency and social legitimacy are not necessarily correlated,”³⁷ although it will be noted that blueprint and substantive theories of the rule of law both are concerned with technical standards and efficiency. Toharia’s view reflects the rule of law properly so called, which lacks required institutional forms or mandatory expressions. It is overlooked because of the pressure for consistency to maintain the international rule of law.

Legitimacy as social acceptability represents a match between the concerns of the subject population and the system and rules they agree to institute in response. In

Peace-Keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 – S/24111, 17 June 1992: ‘Fulfilment of the Humanitarian Mandate in the Context of Peace-keeping Operations’ in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p29), pp29, 31.

³⁵The ambiguity could be in the text or in differing interpretations emerging in the course of the operation, and which are “papered over” as a compromise: Brahimi Report, para 56, Part F: Clear, Credible and Achievable Mandates. Ganzglass is critical that NGO rule of law assistance provided to local governments imbues them with a legitimacy they may not otherwise have: Martin P. Ganzglass, ‘Afterword: Rebuilding the Rule of Law in the Horn of Africa,’ in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p340), p348.

³⁶Plunkett, for example, struggles with this aspect: above n3, pp224-5.

³⁷José Juan Toharia, ‘Evaluating Systems of Justice Through Public Opinion: Why, What, Who, How, and What For?’ in Erik G. Jensen and Thomas C. Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p21), see especially pp25-31.

Iraq, for example, the refusal of the occupation authorities to allow the Iraqi people to decide whether or not, or to what extent, the new constitution and judiciary would rely on Islamic law was subject to significant criticism – legitimacy was not necessarily a result of secularism or objectivity, but of closeness to the values and concerns of the population.³⁸

Domestic legitimacy is the essence of the few emerging criticisms of rule of law interventions. Efforts, particularly military efforts, to implement standard form ‘rule of law’ measures, risk “a destabilising imposition of legal norms,” and

a superficiality of externally imposed norms. While creating the illusion of progress, such structures have little or no grounding and hence little long term viability in the soil of sovereign stability. In essence, this would be a form of legal colonialism that could undermine international peace and security and actually be counterproductive in terms of societal stability.³⁹

5.3 The Remaining Role for Interveners

That is not to say that there is no remaining role for intervention; indeed, there are two. The first, and most important, is the restoration of public order. To this end, the law of intervention under occupation or by Security Council authority permits a variety of measures to restore “public order” and the “administration of justice,” or “international peace and security.” These, as has been shown, are not necessarily consistent with the rule of law properly conceived, nor even conceived on rights-based institutionalism views of the rule of law.

More importantly, the simple involvement of foreign interveners, who tend to be exempt from the laws and the legal system (the ‘law and order’ to use the terms of

³⁸Stanley Roberts, ‘Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq’ (2004) 33 *Hofstra LR* 367, at 398-9. Lisa Anderson provides an interesting analysis of the legitimacy challenge posed by populist Islamic movements to secular, Western-style governments, when the former prove themselves “better organised, more efficient and less corrupt than the government administration” and are able to “guarantee law and order.” Lisa Anderson, ‘Fulfilling Prophecies: State Policy and Islamic Radicalisation,’ in John L. Esposito (Ed), *Political Islam: Revolution, Radicalism or Reform?*, Lynne Rienner Publishers, Boulder, 1997 (p17), p24.

³⁹Michael A. Newton, ‘Harmony or Hegemony: The American Military Role in the Pursuit of Justice’ (2004) 19 *Conn J Int’l Law* 231, at 232. Stromseth and her colleagues examine the theme of imperialism during 1990s interventions, observing a link between former colonial Western states, who denounce imperialism, conducting interventions in which they tend to remain as “de facto governments” for years afterward, and the fact that most states intervened in (whether “failed” like Sierra Leone, or “rogue” like Iraq) have previously been under imperial rule: above n2, p2.

occupation law) which they are attempting to create or impose, means that they cannot participate directly in the domestic rule of law relationship. In Kosovo and East Timor, for example, UN forces exercised ‘all legislative and executive authority ... including the administration of the judiciary,’”⁴⁰ but were themselves explicitly excluded from the legal system they sought to create.⁴¹ The explicit role of the intervener is to exercise potentially coercive powers to restore order, including administrative detention for security purposes and the creation of special security courts and offences. These measures should be employed to the extent necessary to restore a basic level of security in public life.⁴²

However, that is not to say that no ‘rule of law’ role in recovering states remains, especially given the pressure for consistency and coherency in the hierarchical structure of international law. Interveners and the international community may, and perhaps should if expert, continue to be observers, trainers and facilitators in the rule of law discussion within the subject society. They may usefully bring examples from other legal systems as ideas to emulate, but they cannot mandate them through permanent changes to domestic structures or systems. Brahimi noted in his report the role of “unnoticed” diplomatic efforts towards conflict prevention and peacemaking as a one of the “three principal activities” of UN peace operations;⁴³ this is also the primary means of rule of law assistance although it is much less than active intervention.

Commenting on the work to create the rule of law in newly independent Eritrea, Ganzglass notes with approval the control retained by the government of Eritrea over the process of developing and adopting substantive rules – foreign drafting assistance was sought but Eritrea controlled “process and content.” Although not quite clear whether by choice or by conditions attached to international

⁴⁰Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 *Am J Comp L* 331, at 349, referring to UN Mission in Kosovo (UNMIK) *Regulation 1/1999: On the Authority of the Interim Administration in Kosovo*, entered into force 7 September 1999. Stromseth et al, above n2, make this point more generally, arguing that the credibility of the intervener depends on their own adherence to rule of law principles (which they conflate with human rights protection) during the intervention, at p4.

⁴¹*Ibid.*

⁴²For example, Plunkett considers the first requirement for a peace operation to create a “domestic criminal justice system to prosecute offenders for crimes committed during the currency of the operation, which may involve the intervener bringing their own law and establishing their own courts:” above n3, pp213-4. Intervention law addresses this in some detail, but only in the contest of security matters.

⁴³Brahimi Report, para 10. The other two are peace-keeping and peace-building.

development funding, “Eritreans gave the Commercial Code priority because they regarded it as essential for attracting private investment and rebuilding the economy.”⁴⁴ Advisor Ganzglass considered that it was the inclusion of “not only the legal community, but also representatives of the society to be governed by the laws,” here Eritrean women, that “the draft truly became Eritrean law.”⁴⁵ Significantly, in providing advice, the team of which Ganzglass was part drew on laws from eight different systems.⁴⁶

The Eritrean experience is to be contrasted to the Brahimi report which suggests the application of a standard criminal code in situations of emergency.⁴⁷ Developing “a coherent international legal framework for the organisation of justice in post-conflict societies,” does not require standard form solutions across vastly different societies.⁴⁸ They are a simple solution, but because they may represent significant changes to the domestic legal structure and content, they produce visible results. An intervener appealing to a rule of law mission as an appeal for mission legitimacy who can demonstrate such change can better attract the political, financial and material support seen as essential to mission success.⁴⁹

In the residual advisory role, the capacity of military interveners to provide useful assistance must be questioned. It is beyond the scope of this thesis to consider the actual skill and capability of military forces to advise or assist in judicial and legal reform. However, once order is restored as the primary role of intervention, then the security obstacles to the deployment of civilian experts, whether through government agencies or Non-Government Organisations (NGOs), are removed. Ganzglass favours the latter to hasten dissemination of expert advice in the target area, although he is critical of the legitimacy and political problems arising from the national basis of most “justice-based NGOs,” recommending a new international NGO.⁵⁰ Practice in Afghanistan in 2008, for example by Germany, favours an

⁴⁴Ganzglass above n35, pp345-6.

⁴⁵Ibid, p347.

⁴⁶Singapore, Australia, Canada, Greece, Israel, Germany, Great Britain and Ethiopia: *ibid*, pp345-6.

⁴⁷Brahimi Report, paras 80-1.

⁴⁸Stahn, above n10, at 318.

⁴⁹Kelly, *Peace Operations*, above n1, para 1039. The Brahimi Report described “political support” as one of the “key conditions” for success: para 4.

⁵⁰Ganzglass above n35, pp348.

approach of advice and assistance to Afghan authorities through the National Justice Program.⁵¹

Kelly too favours non-military NGO involvement under occupation, due to the minimal level of obligation upon the occupant to act to meet the needs of the local population and a constant NGO presence.⁵² Although he considers occupation law broadly permissive as to rule of law intervention, requiring only that any feasible excess of administrative resources should be devoted to the local population.⁵³ The Brahimi Report, closely following a blueprint analysis of the rule of law, takes a more governmental approach – unsurprising given its assumption of UN Security Council auspices, and thus intergovernmental participation – and calls for trained “on-call lists of civilian police, international judicial experts, penal experts and human rights specialists ... in sufficient numbers to strengthen rule of law institutions, as needed.” They should enter an area of operations before the “main body” of police and legal specialists and as part of the missions “law and order component.”⁵⁴ This presupposes the existence of a basic level of security already in existence.

Although practice in rule of law operations, particularly in Iraq since 2003, has suffered significantly from the assumption that permanent reform should proceed contemporaneously with security, or that the former should produce the latter, and from the lack of legitimacy that has stemmed from the fact of intervention, the provision of security and advice to the Interim Iraqi Government seems now to be fruitful, with a declining death rate, the conduct of provincial elections in January 2009, and the withdrawal of MNF-I troops from the streets.⁵⁵ The abundant lessons

⁵¹Press and Information Office of the Government of the Federal Republic of Germany, *The Federal Government's Afghanistan Policy*, Berlin, September 2008, p23.

⁵²Kelly, *Peace Operations*, above n1, p237, reference omitted.

⁵³*Ibid.*

⁵⁴Brahimi Report, p.xiii. The Report has a heavy bias towards the role of deployed police and criminal justice experts in building the rule of law and human rights, particularly in retraining and restructuring the local police forces and building capacity to respond to disorder. Applying the blueprint analysis, the Report also requires domestic courts suitably ‘strengthened’ by international rights experts, and conceives of international police directly participating in international war crimes investigation and prosecution: paras 39-40.

⁵⁵See for example, Executive Summary, *Report to Congress in accordance with the Department of Defense Supplemental Appropriations Act 2008: Measuring Security and Stability in Iraq*, March 2009, available at http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf, viewed 18 October 2009; Alissa J. Rubin, ‘Iraq Marks Withdrawal of US Troops from Cities,’ *New York Times*, 30 June 2009, available at <http://www.nytimes.com/2009/07/01/world/middleeast/01iraq.html>, viewed 18 October 2009.

from this intervention and others, both under occupation and by Security Council Authority, indicate the future of rule of law operations. Military interveners should focus their attention on their primary security function, restoring order in daily life and using the extraordinary measures granted them to do so. Accepting this reality allows a domestic rule of law to take shape, with the scope for advice allowing the input the international rule of law requires for its own coherence.

BIBLIOGRAPHY

- Agence France Press, 'Saddam Trial Not Independent or Impartial: UN Official,' 7 November 2006, available at <http://www.abc.net.au/news/newsitems/200611/s1782551.htm>, viewed 13 October 2009.
- Alexander, George, 'The Illusory Protection of Human Rights by National Courts during Periods of Emergency' (1984) 5 *Human Rights Journal* 1.
- Allain, Jean, *International Law in the Middle East: Closer to Power than Justice*, Ashgate, Aldershot, 2004.
- American Forces Press Service, 'Iraq's Central Criminal Court Convicts Insurgents,' Washington, 2 August 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9B06E4DD1F3DF932A3575BC0A9629C8B63&sec=&spon=&pagewanted=all>, viewed 13 October 2009.
- American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, St Paul, Minnesota, 1987.
- Anderson, Lisa, 'Fulfilling Prophecies: State Policy and Islamic Radicalisation,' in John L. Esposito (Ed), *Political Islam: Revolution, Radicalism or Reform?*, Lynne Rienner Publishers, Boulder, 1997 (p17).
- Annexstad, Major W. James, 'The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants – A Look at the Task Force 134 Process and the Future of Detainee Prosecutions' (2007) *Army Lawyer* 72.
- Arechega, Dr Jiminez, *Final Recapitulation, Inter-American Seminar on State Security, Human Rights and Humanitarian Law*, Inter-American Institute of Human Rights, San Jose, 1982.
- Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Faber and Faber, London, 1963.
- Aristotle, *The Politics*, III.16 (translated Benjamin Jowett, Nuvision, 2004).
- Arndt, H.W., "The Origins of Dicey's Concept of the Rule of Law", (1957) 31 *Aust LJ* 117.
- Arraf, Jane, 'Ramadi struggles to instill a rule of law,' *The Christian Science Monitor*, 21 Aug 09, available at <http://www.csmonitor.com/2009/0821/p06s23-wome.html>, viewed 8 September 2009.
- Baxter, Major Richard, 'The Duty of Obedience to the Belligerent Occupant' (1950) 27 *BYBIL* 235.

- Bay, Austin, 'Quiet Step for the Rule of Law,' *The Washington Times*, 12 April 2007, available at <http://www.washingtontimes.com/news/2007/apr/12/20070412-085639-2020r/print/>, viewed 19 January 2009.
- Benvenisti, Eyal, *The International Law of Occupation*, Princeton University Press, Princeton (NJ), 1993.
- Bokhari, Farhan, 'Judicial Independence for Swat Threatens Integrity of Pakistan,' *Jane's Defence Weekly*, 22 April 2009, p5.
- Bouvier, Antoine, 'Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis' (1995) 309 *Intl Rev of the Red Cross* 638-666.
- Braithwaite, John, and Drahos, Peter, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000.
- British Broadcasting Corporation News, 'Iraq's Jails "Terribly Overcrowded,"' 25 November 2008, available at http://news.bbc.co.uk/go/pr/ft/-/1/hi/world/middle_east/7748795.stm, viewed 19 January 2009.
- Brownlie, Ian, *The Rule of Law in International Affairs*, Martinus Nijhoff, The Hague, 1998.
- Butovsky, Yaron, 'Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank' (1983) 21 *Can YBIL* 217.
- Carothers, Thomas, 'The Rule-of-Law Revival,' in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p3).
- Cass, R.A., 'Judging: norms and incentives of retrospective decision-making' (1995) 75 *Boston Uni LR* 954.
- Cassese, Antonio, *International Law in a Divided World*, Clarendon Press, Oxford, 1986.
- Center for Law and Military Operations, *Rule of Law Handbook*, Charlottesville (VA), 2007.
- Charlesworth, Hilary, 'Feminist Ambivalence about International law' (2005) 11 *International Legal Theory* 1.
- Charlesworth, Hilary, 'Whose Rule? Women and the international rule of law,' in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p83).
- Charney, Jonathan, 'Universal International Law' (1993) 87 *AJIL* 529.
- Chesterman, Simon, 'An International Rule of Law?' (2008) 56 *Am J Comp L* 331.
- Chowdhury, Subrata Roy, *Rule of Law in a State of Emergency*, Pinter Publishers, London, 1989.

- Coalition Provisional Authority, Office of Strategic Communications Press Release, 'Iraq's Central Criminal Court Convicts Two Oil Smugglers,' 14 October 2003, http://www.cpa-iraq.org/pressreleases/20031014_OCT-14-Conviction.htm, viewed 23 March 2008.
- Cohen, Justice Haim, 'Introduction', in Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel*, Tel Aviv, 1981.
- Combined Arms Training and Doctrine Centre, *Land Warfare Doctrine 1: The Fundamentals of Land Warfare*, Commonwealth of Australia, Canberra, 1998.
- Commission on Human Rights, Report of the Special Rapporteur Mr John Dugard, *Question of the Violation of Human Right in the Occupied Arab Territories, Including Palestine*, Commission on Human Rights E/CN.4/2004/6, 8 September 2003.
- Commission on Human Rights, Report of the Special Rapporteur Mr. Bacre Waly Ndiaye, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions, Addendum: Country Situation*, UN Doc.E/CN.4/1998/68/Add.1, 19 December 1997.
- Craig, Paul, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.
- Daintith, Terence, 'Is International Law the Enemy of National Democracy?' in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p115).
- Deen, Thalif, 'Politics: Non Aligned Movement Slams "Humanitarian Intervention",' *Inter Press Service*, 6 April 2000.
- Dicey, Albert Venn, *Introduction to the Study of the Law of the Constitution*, 9th Edn, MacMillan, London, 1948, (1885).
- Dinstein, Yoram, 'Defences,' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (Eds), *Substantive and Procedural Aspects of International Criminal Law*, Vol 1, Kluwer, The Hague, 2000 (p367).
- Dinstein, Yoram, 'Belligerent Occupation and Human Rights,' (1978) 8 *Isr YBHR* 104.
- Durham, Helen, 'Mercy and Justice in the Transition Period,' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p145).
- Dworkin, Ronald, *Law's Empire*, Hart Publishing, Oxford, 1998.

- Dworkin, Ronald, *A Matter of Principle*, Harvard University Press, Cambridge Massachusetts, 1985.
- Eckholm, Erik, 'Iraqi Indicted for Proposal to Open Talks with Israel,' *The New York Times*, 6 Oct 2004, available at <http://www.nytimes.com/2004/10/06/international/middleeast/06arrest.html>, viewed 10 November 2008.
- Eijsbouts, Professor W.T., 'Introduction,' in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p3).
- Evatt, H.V., *The Rum Rebellion*, Angus and Robertson, Sydney, 1938.
- Fairman, C., 'Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste,' (1951) 45 *AJIL* 541.
- Falk, Richard, 'Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank' (1989) 2 *J Refugee Stud* 40.
- Fallon Jr, Richard H., '“The Rule of Law” as a Concept in Constitutional Discourse' (1997) 97 *Columbia LR* 1.
- Farrall, Jeremy Matam, *United Nations Peacekeeping and the Rule of Law*, Issues Paper Nr 1, Australian National University Centre for International Governance and Justice, March 2007.
- Farrall, Jeremy Matam, *United Nations Sanctions and the Rule of Law*, Cambridge University Press, Cambridge, 2007.
- Feilchenfeld, E.H., *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington, 1942.
- Fletcher, George P., *Basic Concepts of Legal Thought*, Oxford University Press, Oxford, 1996.
- Fraenkel, Ernst, *Military Occupation and the Rule of Law*, Oxford University Press, Oxford, 1944.
- Franck, Thomas M., *The Power of Legitimacy Among Nations*, Oxford University Press, New York, 1990.
- Frank, Michael, 'Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq' (2006) 18 *Florida J of Intl Law* 1.
- Fuller, Lon, *The Morality of Law*, Yale University Press, New Haven, 1964 (1969).
- Ganzglass, Martin P., 'Afterword: Rebuilding the Rule of Law in the Horn of Africa,' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p340).

- Gellman, Barton, and Mufson, Steven, 'Humanitarian War: Conflict Tests a Paradigm of Values-Based International Action,' *The Washington Post*, 6 June 1999, at A20.
- Gerson, Allan, 'Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14 *Harv Intl LJ* 1.
- Gettleman, Jeffrey, 'The Reach of War: The Law; Making Wheels of Justice Turn in a Chaotic Iraq,' *The New York Times*, 1 August 2004, <http://query.nytimes.com/gst/fullpage.html?res=9B06E4DD1F3DF932A3575BC0A9629C8B63&sec=&spn=&pagewanted=all>, viewed 13 October 2009.
- Gilmore, Gerry, 'Iraqi Courts, Police Institute Rule of Law, Officials Say,' American Force Press Service News Articles, 13 August 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=47034>, viewed 19 January 2009.
- Ginsburg, Tom and Moustafa, Tamir (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008.
- Giordano, Joseph, 'Trying Insurgents in Iraqi Courts Seen as Big Step in Rebuilding Legal System,' *Stars and Stripes (Mideast Edn)*, 26 December 2004, http://www.military.com/NewContent/0,13190,SS_122704_Court,00.html, viewed 13 October 2009.
- von Glahn, Gerhard, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957.
- Glennon, Michael J., *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, Palgrave, New York, 2001.
- Global News Wire, 'Iraq: Judicial Review Committee Dismisses 66 Judges,' 5 November 2003.
- Gnesa, Edi, *Die von Israel besetzten Gebiete im Völkerrecht: Eine besetzungsrechtliche Analyse*, Schweizer Studien zum Internationalen Recht Band 25, Zürich, 1981.
- Goldie, L.F.E., 'Title and Use (and Usufruct) – An Ancient Distinction Too Oft Forgotten' (1985) 79 *AJIL* 689.
- Goodman, Davis, 'The Need for Fundamental Change in the Law of Belligerent Occupation' (1984-5) 37 *Stan LR* 1573.
- Goodman, Josh, 'Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel' (2009) 32 *Hastings Int'l & Comp L Rev* 477.
- Gordon, Michael R., 'In Baghdad: Justice Behind the Barricades,' *New York Times*, 29 July 2007, available at <http://www.nytimes.com/2007/07/30/world/africa/30iht-30military-web.6889642.html>, viewed 18 October 2009.
- Gray, John, *False Dawn: The Delusions of Global Capitalism*, New Press, New York, 1998.

- Greenspan, M., *The Modern Law of Land Warfare*, University of California Press, California, 1959.
- Grotius, Hugo, *de Jure Belli ac Pacis Libri Tres*, 1625 (translated Francis W. Kelsey, Clarendon Press, Oxford, 1925)
- von Haast, H.F., 'A Second Nuremberg Trial' (1948) 24 *NZLJ* 67.
- Hadar, Z., 'Administrative Detentions Employed by Israel' (1980) 1 *Isr YBHR* 283.
- Hart, H.L.A., *The Concept of Law*, 1907 (2nd Edn, Clarendon Press, Oxford, 1994).
- al-Hashemi, Adnan Abdelazak, 'Criminal Trial Procedures as a Tool to Serve Litigants, Protect Human Rights, and Activate the Judicial Activity,' *Iraqi Judicial Forum: Iraqi Judicial System: Reality and Prospects*, Baghdad, 2004.
- Hayek, F.A., *The Road to Serfdom*, University of Chicago Press, Chicago, 1944 (1976).
- Heininger, Janet, *Peacekeeping in Transition: The United Nations in Cambodia*, Twentieth Century Fund Press, New York, 1994.
- Heller, Thomas C., 'An Immodest Postscript,' in Erik G Jensen and Thomas C Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p382).
- Henckaert, Jean-Marie, and Doswald-Beck, Louise, (Eds), *Customary International Humanitarian Law*, Vol 2 (Practice Part 2); Cambridge University Press, Cambridge, 2005.
- Hilbink, Lisa, 'Agents of Anti-Politics: Courts in Pinochet's Chile' in Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p102).
- Hinnant, Lori, 'Iraq's Legal System Burdened by War's Wake,' Associated Press, Baghdad, 6 December 2007.
- Hins, Dr Wouter, 'An Ambiguous Story about Supremacy of EC Law; Report from the Netherlands,' pp85-96, in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p85).
- Human Rights Committee, *General Comment 13: Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994).
- Human Rights Watch, *The Quality of Justice: Failings of Iraq's Central Criminal Court*, 14 December 2008, available at <http://www.HumanRightsWatch.org/en/reports/2008/12/14/quality-justice-0>, viewed 18 October 2009.

- Human Rights Watch, *World Report 2005: Country Summary: Iraq*, 13 January 2005, available at <http://www.HumanRightsWatch.org/legacy/english/docs/2005/01/13/iraq9805.htm>, viewed 18 October 2009.
- Huyse, Luc, 'Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past' (1995) 20 *Law and Social Inquiry* 51.
- Iraqi Bar Association*, al-Mansour, Baghdad, August 2007, available at http://www.nichibenren.or.jp/en/directory/data/E07-Iraqi_Bar_Association.pdf, viewed 13 October 2009.
- Israeli National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel*, Tel Aviv, 1981.
- Jackson, Robert, *Sovereignty: Evolution of an Idea*, Polity Press, Cambridge, 2007.
- Jensen, Erik G., 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses,' in Erik G Jensen and Thomas C Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p336).
- Jones, Seth, Wilson, Jeremy, Rathmell, Andrew, and Riley, K. Jack, *Establishing Law and Order After Conflict*, Rand Corporation, Santa Monica, 2005.
- Kant, Immanuel, *The Metaphysics of Morals*, 1785 (translated by Mary Gregor, Cambridge University Press, Cambridge, 1991).
- Kant, Immanuel, *Perpetual Peace*, 1795 (translated M. Campbell Smith, Allen and Unwin, London, 1903).
- Kastner, Professor Klaus, 'Der Nürnberger Juristen-Prozess 1947,' *Oberlandesgericht Nürnberg: Beiträge zur Rechtsgeschichte*, p4, http://www.justiz.bayern.de/imperia/md/content/stmj_internet/gerichte/oberlandesgerichte/nuernberg/kastner_jp.pdf , accessed 5 April 2009.
- Kastner, Professor Dr Klaus, "Der Dolch des Mörders war unter der Robe des Juristen verborgen." *Der Nürnberger Juristen-Prozess 1947*, http://www.justiz.bayern.de/imperia/md/content/stmj_internet/gerichte/oberlandesgerichte/nuernberg/kastner_jp.pdf, viewed 17 October 2009.
- Kelly, Michael, 'The Role of the Military in Globalising the Rule of Law,' in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005.
- Kelly, Michael 'Military Force and Justice' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p229).
- Kelly, Michael, *Peace Operations: Tackling the Military, Legal and Policy Challenges*, Australia Government Publishing Service, Canberra, 1997.

- Kelly, Major M.J., 'Legal Regimes and Law Enforcement in Peace Operations' in Hugh Smith (Ed), *The Force of Law: International Law and the Land Commander*, Australian Defence Studies Centre (ADFA), Canberra, 1994 (p189).
- Kelsen, Hans, *A Pure Theory of Law* (1934) (translated by Max Knight, University of California Press, Berkeley, 1967).
- Khadduri, Majid, *The Islamic Law of Nations: Shaybānī's Siyar*, John Hopkins Press, Baltimore, 1966.
- Kinley, David, 'The Universalizing of Human Rights and Economic Globalization: What Roles for the Rule of Law?' in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p96).
- Kleinfeld, Rachel, 'Competing Definitions of the Rule of Law,' in Thomas Carothers (Ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006 (p31).
- Koskenniemi, Martti, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge, 2001.
- Kourula, Pirrko, 'Governance and Coordination in Conflict and Post-Conflict Situations' in Guy Goodwin-Gill and Stefan Talmon (Eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999 (p351).
- Krane, Jim and abu-Nasr, Donna, 'Iraq gets court reform; US soldier dies,' *The Times Leader* (Pennsylvania, USA), <http://www.timesleader.com/mld/timesleader/6103225.htm>, posted 17 June 2003, reproduced at http://www.redorbit.com/news/general/2838/iraq_gets_court_reform_us_soldier_dies/, viewed 23 March 2008.
- Lalive, Jean-Flavien, 'Introduction,' in Norman S. Marsh, (Ed), *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India, 1959*, International Commission of Jurists, Geneva, 1959 (p1).
- Landry, Pierre, 'The Institutional Diffusion of Courts in China: Evidence from Survey Data,' Ginsburg, Tom and Moustafa, Tamir (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p207).
- Linton, Suzannah, 'Prosecuting Atrocities at the District Court of Dili' (2001) 2 *MJIL* 301.
- Lippman, Matthew, 'The Prosecution of Josef Altstoetter et al' (1998) 16 *Dick J Intl Law* 343.
- Liu, Melinda, and Dehghanpisheh, Babak, 'Questions of Justice: The Abu Ghraib Abuses are Part of a Deeper Crisis,' *Newsweek* (US Edition), 17 May 2004, <http://www.keepmedia.com:/Register.do?oliID=225>, viewed 22 February 2009.

- Lund, Jakob S., and Safran-Hon, Daniel, "Third Round of Intergovernmental Negotiations on UN Security Council Reform Conclude," 63rd Plenary Session of the UN General Assembly (1-3 Sep 09), Centre for UN Reform Education, <http://www.centerforunreform.org/node/407>, viewed 11 October 2009.
- al-Mahmoud, Chief Judge Medhat, 'The Judicial System in Iraq: A Review of the Legislation Regulating Judicial Affairs in Iraq,' *Iraqi Judicial Forum: The Judicial System in Iraq, Facts and Prospects*, Baghdad, 2004.
- Magaloni, Beatriz, 'Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico,' in Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p180).
- Marsh, Norman S. (Ed), *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India, 1959*, International Commission of Jurists, Geneva, 1959.
- Mason, The Hon Sir Anthony, AC, KBE, 'The Rule of Law and Economic Transactions' in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p121).
- McDermott, Niall, 'Introduction' to Raja Shehadeh and Jonathan Kuttub, *The West Bank and the Rule of Law*, The International Commission of Jurists, Geneva, 1980.
- McDonald, Gabrielle Kirk, and Swaak-Goldman, Olivia, (Eds), *Substantive and Procedural Aspects of International Criminal Law*, Vol 1, Kluwer, The Hague, 2000.
- McQuade, William, 'Operation Hammurabi Information Technology: Metrics Analysis Report for Baghdad Courts (Iraq),' *Army Lawyer*, 1 October 2006, p1.
- de Mello, Sergio Vieira, 'Humanitarian and Military Interface in Peace-keeping: Cambodia and Bosnia-Herzegovina: A Comparative Analysis' in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p18).
- Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, Oxford, 1989.
- Meron, Theodor, 'On a Hierarchy of International Human Rights' (1986) 80 *AJIL* 1.
- Meron, Theodor, 'The Geneva Conventions as Customary Law' (1987) 81 *AJIL* 348.
- Morgan, E.S., *American Slavery, American Freedom*, Norton, New York, 1975.
- Morgenstern, Felice, 'Validity of the Acts of the Belligerent Occupant' (1951) 28 *BYBIL* 291.
- Moss, Michael, 'Iraq's Legal System Stagers Beneath the Weight of War,' *The New York Times*, 17 December 2006, <http://www.nytimes.com/2006/12/17/world/middleeast/>

17justice.html?ei=5090&en=7fa73a4895399700&ex=1324011600&partner=rssuserl and&emc=rss&pagewanted=all, viewed 13 October 2009.

- Moustafa, Tamir, 'Law and Resistance in Authoritarian States: The Judicialisation of Politics in Egypt,' in Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p132).
- Müller, Ingo, *Hitler's Justice: The Courts of the Third Reich*, Harvard University Press, Cambridge Massachusetts, 1991 (translated by Deborah Schneider).
- Murphy, Sean D., *Humanitarian Intervention: The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia, 1996.
- Nardin, Terry, 'Theorising the International Rule of Law' (2008) 34 *Rev of Intl Studies* 385.
- Neal, David, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge University Press, Cambridge, 1991.
- Newton, Michael A., 'Harmony or Hegemony: The American Military Role in the Pursuit of Justice' (2004) 19 *Conn J Intl Law* 231.
- Nollkaemper, Professor Dr André, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia,' in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p13).
- Norton Moore, John, 'Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance' (1997) 37 *Virg J Int'l L* 811.
- Oppenheim, L., 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 *LQR* 366.
- Oraá, Jaime, 'The Protection of Human Rights in Emergency Situations under Customary International Law' in Guy Goodwin-Gill and Stefan Talmon (Eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999 (p413).
- Oraá, Jaime *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992.
- Oswald, Bruce, 'The Interfet Detainee Management Unit in East Timor' (2000) *YB of IHL* 347.
- Othman, Mohamed C., *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, Springer, Berlin, 2005.
- Ottolenghi, Michael, 'The Stars and Stripes in al-Fardos Square: The Implications for the Law of Belligerent Occupation' (2004) 72 *Fordham LR* 2177.

- Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, A/55/305 S/2000/809, United Nations, 2000.
- Pettit, P.H., *Equity and the Law of Trusts*, 8th Edn, Butterworths, London, 1997.
- Pfanner, Toni, 'Application of International Humanitarian Law and Military Operations undertaken under the United Nations Charter' in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p49).
- Pictet, Jean, *Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958.
- Plato, *The Republic*, 715d (translated by Trevor J. Saunders, Penguin, 1970).
- Plattner, Denise, 'Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law' (1998) 288 *International Review of the Red Cross* 249, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMAR>, viewed 13 October 2009.
- Plunkett, Mark, 'Rebuilding the Rule of Law,' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo, 2003 (p207).
- Plunkett, Mark, 'The Establishment of the Rule of Law in Post-conflict Peacekeeping' in Hugh Smith (Ed), *International Peacekeeping: Building on the Cambodian Experience*, Australian Defence Studies Centre (ADFA), Canberra, 1994.
- Press and Information Office of the Government of the Federal Republic of Germany, *The Federal Government's Afghanistan Policy*, Berlin, September 2008.
- Prime Minister's Office, Republic of Iraq, *Reform Paper on the Detention System in Iraq*, July 2007 (translated by Law and Order Task Force, reproduced by permission, copy on file with author).
- Progress Report of the UN Secretary-General, *Question of East Timor*, A/50/436, 19 September 1995.
- Questiaux, N., *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency*, UN Doc E/CN 4/Sub 2/1982/15, 27 July 1982.
- Radbruch, Gustav, *Rechtsphilosophie*, 1932 (6th Edn, K.F. Koehler, Stuttgart, 1963).
- Rawls, John, *A Theory of Justice*, Harvard University Press, Cambridge Massachusetts, 1971.

- Raz, Joseph, *Ethics in the Public Domain; Essays on the Morality of Law and Politics*, Clarendon Press, Oxford, 1994.
- Raz, Joseph, 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195.
- Remy-Granger, Dominique, 'The Ambiguities of the State Based on the Rule of Law; a Unitary System á la Française,' pp53-64, in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p65).
- Rennell of Rodd, Lord, *British Military Administration of Occupied Territories in Africa During the Years 1941-1947*, His Majesty's Stationary Office, London, 1948.
- Report to Congress in accordance with the Department of Defense Supplemental Appropriations Act 2008: Measuring Security and Stability in Iraq*, March 2009, available at http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf, viewed 18 October 2009.
- Roberts, Adam, 'The End of Occupation in Iraq,' 28 June 2004, International Humanitarian Law Research Initiative, <http://www.ihlresearch.org/iraq/feature.php?a=51>, viewed 4 April 2009.
- Roberts, Adam, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 *AJIL* 44.
- Roberts, Adam, 'The Applicability of Human Rights Law During Military Occupations' (1987) 13 *Rev of Intl Studies* 39.
- Roberts, Adam, 'What is a Military Occupation' (1984) 55 *BYBIL* 249.
- Roberts, Adam, and Guelff, Richard, (Eds), *Documents on the Laws of War*, 3rd Edn, Oxford University Press, Oxford, 2000, p68.
- Roberts, Stanley, 'Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq' (2004) 33 *Hofstra LR* 367.
- Root, Hilton, and May, Karen, 'Judicial Systems and Economic Development' in Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p304).
- Rousseau, Jean-Jacques, *The Social Contract* (1762) (translated by Maurice Cranston, 1968, Penguin).
- Rubin, Alissa J., 'Iraq Marks Withdrawal of US Troops from Cities,' *New York Times*, 30 June 2009, available at <http://www.nytimes.com/2009/07/01/world/middleeast/01iraq.html>, viewed 18 October 2009.
- Saikal, Amin, 'The Dimensions of State Disruption,' in William Maley, Charles Sampford and Ramesh Thakur (Eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States*, United Nations University Press, Tokyo (p17).

- Sampford, Charles, 'Reconceiving the Rule of Law for a Globalizing World' in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p9).
- Scalia, Antonin, 'The Rule of Law as a Law of Rules' (1989) 56 *Uni Chicago LR* 1175.
- Schabas, William A., *The Abolition of the Death Penalty in International Law*, 3rd Edition, Cambridge University Press, Cambridge, 2003.
- Scharf, Michael, and Newton, Michael, 'The Iraqi High Tribunal's Dujail Trial Opinion' (2006) 10(34) *ASIL Insights*, available at http://www.asil.org/insights061218.cfm#_ednref2, viewed 4 April 2009.
- Scheffer, David J., 'Agora (Continued): Future Implications of the Iraq Conflict' (2003) 97 *AJIL* 842.
- Schwarzenberger, G., *International Law as Applied by International Courts and Tribunals*, Vol II: The Law of Armed Conflict, Stevens and Sons, London, 1968.
- Schwenk, E.H., 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations,' (1945) 54 *Yale LJ* 393.
- Shambayati, Hootan, 'Courts in Semi-Democratic/Authoritarian Regimes: The Judicialisation of Turkish (and Iranian) Politics' in Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p283).
- Shamgar, Meir, 'The Observance of International Law in the Administered Territories,' (1970) 1(1) *Isr YBHR* 266.
- Shehadeh, Raja, and Kuttab, Jonathan, *The West Bank and the Rule of Law*, The International Commission of Jurists, Geneva, 1980.
- Shraga, Daphne, and Zacklin, Ralph, 'The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues' in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p39).
- Silverstein, Gordon, 'Singapore: The Exception that Proves Rules Matter' in Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p73).
- Simbeye, Yitiha, *Immunity and International Criminal Law*, Ashgate Publishing, Aldershot, 2004.
- Simpson, Gerry, 'Two Liberalisms' (2001) 12 *EJIL* 537.
- Simsovic, Douglas J., "No Fixed Address: Universality and the Rule of Law" (2008) 35 *RJT* 739.

- Sommaruga, Cornelio, 'Preface' to Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p1).
- Spinner, Jackie, 'Iraq's New Forum of Justice Seems to Satisfy Few,' *The Washington Post*, 4 August 2004, p.A12, <http://www.washingtonpost.com/ac2/wpdyn/A378152004Aug3?language=printer>, viewed 23 March 2008.
- Stahn, Carsten, 'Justice under Transitional Administration: Contours and Critique of a Paradigm' (2005) 27 *Hous J Intl Law* 311.
- Steiger, Professor Dr Heinhard, 'The Relationship of German National Law with Public International Law and with European Community Law,' in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001.
- Stilt, Kristen, 'Islamic Law and the Making and Remaking of the Iraqi Legal System' (2004) 36 *Geo Wash Intl LR* 695.
- Strohmeier, Hansjorg, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46.
- Stromseth, Jane, Wippman, David and Brooks, Rosa, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006.
- Summers, Robert S., 'A Formal Theory of the Rule of Law' (1993) 6(2) *Ratio Juris* 127.
- Susman, Tina, 'Iraqis Languish in Crowded Jails,' *Los Angeles Times*, 22 September 2008, available at http://www.articles.latimes.com/2008/sep/22/world/fg_detainees22, viewed 19 January 2009.
- Tamanaha, Brian, *On The Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004.
- Tan, Michelle, 'Task Force Puts Iraqi Courts Back to Work,' *Army Times*, 12 November 2007, available at http://www.armytimes.com/news/2007/11/army_safehouse_071112/, viewed 18 October 2009.
- Teitel, Ruti, 'Transitional Jurisprudence: the role of law in political transformation' (1997) 106 *Yale LJ* 2011.
- Temple-Raston, Dina, 'Iraqis on Slow Road to Building Judicial System,' *NPR*, 27 March 2008, available at <http://www.npr.org/templates/story/story.php?storyId=89162530&ps=rs>, viewed 18 October 2009.
- Temple-Raston, Dina, 'Elite Iraqi Task Force Probes Sensitive Crimes,' *NPR*, 26 March 2008, available at <http://www.npr.org/templates/story/story.php?storyID=89123960>, viewed 18 October 2009.

- Tolbert, David, and Solomon, Andrew, "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies," (2006) 19 *Harv Hum Rts J* 29.
- Toharia, José Juan, 'Evaluating Systems of Justice Through Public Opinion: Why, What, Who, How, and What For?' in Erik G. Jensen and Thomas C. Heller (Eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, Stanford (USA), 2003 (p21).
- Trainin, I.P., 'Questions of Guerrilla Warfare in the Law of War' (translated from Russian by Dr John N. Hazard and reprinted) (1946) 40 *AJIL* 534.
- Tripp, Charles, *A History of Iraq*, 3rd Edn, Cambridge University Press, Cambridge, 2007.
- Unger, Roberto, *Law in Modern Society: Toward a Criticism of Social Theory*, Free Press, New York, 1976.
- United Nations, *Report of the Secretary-General on the UN Interim Administration in Kosovo*, 12 July 1999, S/1999/779.
- United Nations, *The Blue Helmets: A Review of United Nations Peace-keeping*, United Nations Department of Public Information, New York, 1990.
- United Nations Assistance Mission in Iraq, *Human Rights Report 1 November – 31 December 2005*, para 15, available at <http://www.uniraq.org/documents/HR%20Report%20Nov%20Dec%2005%20EN.PDF>, viewed 20 April 2008.
- United Nations Assistance Mission in Iraq, *Human Rights Report 1 May-30 June 2006*, para 20, available at <http://www.uniraq.org/documents/HR%20Report%20May%20Jun%202006%20EN.pdf>, viewed 25 April 2008.
- United Nations Assistance Mission in Iraq, *Human Rights Report 1 September-31 October 2006*, paras 39-40, available at <http://www.uniraq.org/documents/HR%20Report%20Sep%20Oct%202006%20EN.pdf>, viewed 26 April 2008.
- United Nations Assistance Mission in Iraq, *Human Rights Report 1 January – 31 March 2007*, para 58, available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf>, viewed 26 April 2008.
- United Nations Assistance Mission in Iraq, *Human Rights Report 1 July – 31 December 2007*, available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jul%20Dec%202007%20EN.pdf>, viewed 26 April 2008.
- United Nations Commission on Global Governance, *Our Global Neighbourhood*, Oxford University Press, Oxford, 1995.
- United Nations Secretary-General, *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 – S/24111, 17 June 1992.

- United Nations Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr L. Despouy (Argentina), UN Doc E/CN.4/Sub.2/1985/19 (17 Jun 1985).
- United Nations Special Representative Mr. Michel Moussalli, *Report on the Situation of Human Rights in Rwanda submitted by the Special Representative*, UN Doc. E/CN.4/1999/33, 8 February 1999.
- United States Department of State, *Inspection of Rule-of-Law Programs*, Embassy Baghdad, 26 October 2005, available at <http://oig.state.gov/lbry/reporthighlights/57056.htm>, viewed 8 September 2009.
- United States Government, *The National Security Strategy of the United States of America*, (September 2002), p9, available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>, viewed 5 April 2009.
- United States Government Accountability Office, Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, U.S. House of Representatives, Statement of Joseph A. Christoff, Director International Affairs and Trade, *Stabilizing and Rebuilding Iraq: Coalition Support and International Donor Commitments*, GAO-07-827T, release dated 9 May 2007, available at <http://www.gao.gov/new.items/d07827t.pdf>, viewed 6 October 2009.
- United States Institute of Peace, *Special Report 104: Establishing the Rule of Law in Iraq*, April 2003.
- Vagts, Detlev, 'International Law in the Third Reich' (1990) 84 *AJIL* 661.
- Vandamme, Thomas, 'Changing the Lawmaking Process in the Netherlands for the Sake of Implementation; A Question of Going Too Far and of not Going Far Enough,' pp97-114, in Thomas Vandamme and Jan-Herman Reestman (Eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001 (p97).
- de Vattel, Emmerich, *The Law of Nations or the Principles of Natural Law*, 1758, bk 2, lxiii (translated by Charles Fenwick, Oceana, New York, 1964).
- Waddell, Major J.G., 'Legal Aspects of UN Peacekeeping' in Hugh Smith (Ed), *The Force of Law: International Law and the Land Commander*, Australian Defence Studies Centre (ADFA), Canberra, 1994 (p47).
- Wahlgren, Lieutenant-General Lars Erik, 'Operational Tasks of Peace-keeping Troops' in Umesh Palwankar (Ed), *Symposium on Humanitarian Action and Peace-Keeping Operations: Report*, ICRC, Geneva, 1994 (p12).
- Waldron, Jeremy, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1.
- War Office, *The Law of War on Land being Part III of the Manual of Military Law*, London, 1985.

- Westlake, John, *International Law*, Vol 2: War, Sweet and Maxwell, London, 1913.
- Williamson, John C., 'Establishing the Rule of Law in Post-War Iraq: Rebuilding the Justice System' (2004) *Ga J Intl & Comp Law* 229.
- Widner, Jennifer with Scher, Daniel, 'Building Judicial Independence in Semi-Democratic Uganda and Zimbabwe,' Tom Ginsburg and Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York, 2008 (p235).
- Woetzel, Robert, *The Nuremberg Trials in International Law*, Revised Edition, Stevens, London, 1962.
- Wright, Quincy, 'International law and Guilt by Association' (1949) 43 *AJIL* 746.
- Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*, Tel Aviv, December 2007.
- Zifcak, Spencer, 'Globalising the Rule of Law: Rethinking Values and Reforming Institutions' in Spencer Zifcak (Ed), *Globalisation and the Rule of Law*, Routledge, London, 2005 (p32).
- Zuhur, Sherifa, 'Empowering Women or Dislodging Sectarianism?: Civil Marriage in Lebanon' (2002) 14 *Yale JL & Feminism* 177.